PETITION FOR MANDAMUS.

SUPREME COURT OF THE UNITED STATES.

No. 6.—ORIGINAL.

THE COMMONWEALTH OF KENTUCKY, PETITIONER,

vs.

GEORGE S. BOUTWELL, SECRETARY OF THE TREASURY OF THE UNITED STATES.

Deny

FILED NOVEMBER, 19, 1871.

SUPREME COURT OF THE UNITED STATES

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1 Supreme Court of the United States.

To the honorable the Chief Justice and associate justices of the Supreme Court of the United States now holding an adjourned term of said court at the city of Washington, in the District of Columbia:

The petition and relation of the Commonwealth of Kentucky, by Preston H. Leslie, governor of the said Commonwealth and ex officio chairman of the board of commissioners of the sinking fund of said Commonwealth, very respectfully showeth:

That, by an act of Congress, approved the 27th day of July, anno Domini 1861, entitled "An act to indemnify the States for expenses incurred by them in the defence of the United States," it was enacted "That the Secretary of the Treasury be, and he is hereby, directed, out of any money in the Treasury not otherwise appropriated, to pay to the governor of any State, or to his duly-authorized agents, the costs, charges, and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops employed in aiding to suppress the present insurrection against the United States, to be settled upon proper vouchers to be filed and passed upon by the proper accounting officers of the Treasury."

Your relator, the State of Kentucky, shows and makes known to your honorable court that the said Commonwealth of Kentucky, by its proper, legal, and constituted authorities, in the several years of our Lord *anno Domini* 1863, 1864, 1865, and 1866, and during the pendency of the late insurrection against the United States, did, at her own proper cost and charge, and out of her own money, enroll, subsist, clothe, supply, arm, equip, pay, and transport a very large number of troops and soldiers, enlisted, raised, and organized by the said Commonwealth of Kentucky, within the territory and limits of said State. And the said troops and soldiers so enrolled, enlisted, raised, and organized by the said State of Kentucky were then and there, during the years aforesaid, and during the pendency of the late insurrection against the United States, employed in aiding to suppress the insurrection then existing against the United States, and under the authority, direction, and request of the President of the United States, and the military officers and agents of the United States having command under the said President of the United States.

And your relator further shows and suggests to this honorable court that the said State of Kentucky, by the governor of the said State and his agents, duly authorized, did afterwards, to wit, June 24th, A. D. 1871, in proper and legal form prefer and present to the United States, through the Department and Secretary of War, due and proper vouchers, in due and legal form, for a part and portion of the costs, charges, and expenses so as aforesaid incurred by said State of Kentucky, in enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting her said troops so as aforesaid employed under direction and authority of the President of the United States, in aiding to suppress the said late insurrection against the United States as aforesaid. And, thereupon, the said Secretary of War, on the 30th day of June, A. D. 1871, acting in his official character and capacity, for and on behalf of the President of the United States, and in virtue of the powers conferred on him by the Constitution and laws of the United States, did

2 then and there advise, adjudge, and decide that the said troops so enlisted and organized as aforesaid, subsisted, clothed, supplied, armed, equipped, paid, and transported by the said State of Ken-

tucky, were employed in aiding to suppress the late insurrection, under the authority of the United States; and that the said State of Kentucky was and is entitled to be paid and indemnified for the said cost, charges, and expenses in that behalf made, paid, and expended to and for the troops and soldiers aforesaid, so as aforesaid raised, enrolled, subsisted, armed, equipped, paid, and transported as aforesaid.

Whereupon the said vouchers, claims, and accounts of the said State of Kentucky, in that behalf, were, in due and legal form presented to the Third Auditor of the Treasury, and who, thereupon, examined settled, and stated said account, and then and there held and decided and adjusted that, upon the said claim and vouchers so presented to, and examined by, him, there was due from the United States for and on account of said services, payments, costs, charges, and expenses in and about the enrollment, organization, equipment, arming, and transportation of her said troops, the sum of five hundred and twenty-five thousand two hundred and fifty eight dollars and seventy two cents, ($525,258 72,) and also then and there held, adjudged, and decided that the services aforesaid had been and were rendered, and the said costs, charges, and expenses had been incurred in accordance with the laws of Congress, and that the aforesaid sum was legally and justly due to the said State of Kentucky from the United States.

And your relator further shows and suggests to this honorable court here that the Third Auditor of the Treasury then and there transmitted the said accounts, claims, vouchers, and his settlement so made thereon as aforesaid, to the Second Comptroller, and which said settlement and decision was thereupon, in due form of law, approved, ratified, and confirmed by said Second Comptroller, and who, thereupon, in due form of law, adjudged that, upon the accounts, claims, and vouchers so presented by and on behalf of said State of Kentucky as aforesaid, there was justly and legally due and owing and payable by the United States to said State of Kentucky the aforesaid sum of five hundred and twenty-five thousand two hundred and fifty-eight dollars and seventy-two cents ($525,258 72.) And the said Comptroller, thereupon, made, in due form of law, his certificate, under his hand and the seal of his said office, of the aforesaid sum so found due and payable to the said State, and caused such certificate so made as aforesaid to be transmitted to the Secretary of War, and who, upon the receipt of the same, caused, in due and legal form, a requisition to be made for a warrant upon the Treasurer of the United States for the payment of the said amount so found due and payable to said State of Kentucky, upon the final settlement and adjustment of the said account by the said accounting officers as aforesaid. And the said requisition of the said Secretary of War, so made as aforesaid, was then and there transmitted to the Second Comptroller of the Treasury, and by whom the same was then and there, in due form of law, approved, confirmed, and countersigned as required by law. And thereupon the said Comptroller transmitted and certified the said requisition to the Third Auditor of the Treasury, who entered, registered, and recorded the same in his office. And thereupon the said Third Auditor of the Treasury then and there, on the 30th day of June, A. D. 1871, certified and transmitted the said requisition of the said Secretary of War, for the payment to said State of Kentucky of the sum aforesaid, with the certificate of said balance of accounts,

3 which said requisition was so approved and countersigned by the Second Comptroller, and so registered and recorded by the Third Auditor of the Treasury as aforesaid, to the Secretary of the Treasury. And thereupon the Acting Secretary of the Treasury

caused to be issued and signed a warrant upon the Treasurer of the United States, in favor of and payable to the said State of Kentucky or to the governor of said State, or his authorized agent, the said sum of five hundred and twenty-five thousand two hundred and fifty-eight dollars and seventy-two cents ($525,258 72) And which said warrant was then and there duly countersigned by the First Comptroller of the Treasury; and which said papers, settlements, certificates, warrants, and orders herein referred to are hereto appended, and, so far as material, made part of this petition in due form of law.

And your relator here further shows and suggests to this honorable court that, upon the thirtieth day of June, A. D. 1871, when said warrant was so made, and ever since, there was and has been an ample and sufficient sum of money in the Treasury of the United States, appropriated by law of Congress, to pay, satisfy, and indemnify the States for costs, charges, and expenses for enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops employed in aiding to suppress the late rebellion against the United States; and that the said appropriation of money in the Treasury, so made by Congress as aforesaid, was and is applicable to the payment of the said sum of five hundred and twenty-five thousand two hundred and fifty-eight dollars and seventy-two cents, so found to be due and payable to the said State of Kentucky, the relator herein, and is more than sufficient in sum and amount to pay the said sum aforesaid; and that the money so appropriated as aforesaid is not payable, nor can the same be applied to any other purpose, person, or object whatever. And your relator here shows to this honorable court that, on the 30th day of June, A. D. one thousand eight hundred and seventy-one, and on divers days and times thereafter, at the city of Washington, in the District of Columbia, the said State of Kentucky, by her properly authorized agent, did request and demand of him, the said George S. Boutwell, Secretary of the Treasury aforesaid, at his office in the Treasury Department, in the city aforesaid, the delivery of the said warrant, so made as aforesaid, to Preston H. Leslie, governor of said Commonwealth, or his authorized agent, and the payment to said governor or his agent of the aforesaid sum of five hundred and twenty-five thousand two hundred and fifty-eight dollars and seventy-two cents for the said costs, expenses, and charges so due to said Commonwealth from the United States, as was finally adjudged and determined by the accounting officers, as is hereinbefore alleged and set forth.

And your relator makes known and suggests further to this honorable court here, that George S. Boutwell, a citizen of the State of Massachusetts, who is, and exercises the office and performs the duties and functions of, Secretary of the Treasury of the United States, on the said 30th day of June, A. D. 1871, and on divers days and times thereafter, aforesaid, at the city of Washington, then and there refused to deliver to said Preston H. Leslie, governor of the Commonwealth of Kentucky, or to his authorized agent, the aforesaid warrant upon the Treasurer of the United States, for the payment of the said sums due and owing by the United States to the said Commonwealth of Kentucky, and still refuses to deliver the same to the said State of Kentucky, or to cause, in any other manner, payment of the said sum due and owing to the said Commonwealth of Kentucky, by the United States, to be made or done, but to pay the same has hitherto refused, and still does refuse, to the great damage and injury of the said Commonwealth of Kentucky.

4

And your relators further show and suggest to this honorable court

here that the making, signing, and delivering of the said warrant to the governor of the State of Kentucky, or his authorized agents, at the time and in the manner so as aforesaid demanded of him, the said George S. Boutwell, Secretary of the Treasury, were and are solely and exclusively ministerial acts, and duties incumbent and imposed by law upon him, the said George S. Boutwell, Secretary of the Treasury, as aforesaid; and that he, the said George S. Boutwell, had not then and there, or at any time thereafter, or has not now, any lawful right, power, or authority to exercise any opinion, judgment, or discretion in the signing and delivering to, or the withholding of said warrant from, the State of Kentucky, the governor thereof, or his agent. But, on the contrary thereof, it is the legal right of the said Commonwealth of Kentucky to have said warrant, and to receive the said sum so as aforesaid finally and conclusively adjudged to be due to her in the premises.

And your relator, the said Commonwealth of Kentucky, further makes known and suggests to this honorable court here that it is entirely without remedy in the premises, unless the same be afforded by the interposition of this honorable court, by their writ of mandamus. And your relators, therefore, pray that a writ of mandamus may issue out of this honorable court, directed to the said George S. Boutwell, commanding him to deliver the warrant aforesaid, or a warrant upon the Treasurer of the United States, for the said sum of five hundred and twenty-five thousand two hundred and fifty-eight dollars and seventy-two cents, due and owing by the said United States to the said State of Kentucky. And that this honorable court may make such other and further orders in the premises as the case may require, and as to right and justice may appertain.

And your petitioners will ever pray, &c.

[SEAL.] PRESTON H. LESLIE.

By the governor:

A. J. JAMES,
Secretary of State.

The foregoing petition was subscribed and sworn to before me by Preston H. Leslie, governor of the Commonwealth of Kentucky, this October 31st, 1871.

D. W. LINDSEY,
U. S. Commissioner.

GEO. R. MCKEE,
Lancaster, Ky;
BARTLEY & CASEY,
Washington, D. C., of Counsel for Relators.

(Indorsed:) The Commonwealth of Kentucky, on the relation of Preston H. Leslie, governor, &c., vs. George S. Boutwell, Sec'y of the Treasury. McKee, Bartley & Casey.

WASHINGTON, *October 11th*, 1871.

Hon. GEO. S. BOUTWELL,
Sec'y of the Treas'y.

DEAR SIR: Having recently been appointed att'y & counsel
5 for the State of Kentucky in the matter of her "war claims," and having filed my letters of authority in the office of the 3rd Auditor, I beg leave to present the following suggestions:

In the first place, I very respectfully ask you to review and revise your decision in the case of the warrant issued to that State on the 30th day of June, A. D. 1871, for five hundred and twenty-five thousand two hundred and fifty-eight dollars and seventy-two cents, ($525,258 72,) for money paid to State militia for services rendered during the years 1863, '64, '65, & '66; or, should you feel so firmly settled in your opinion of the law and facts involved in the case as to probably preclude you reaching any other conclusion than that already attained, then I respectfully ask that you will submit the very important legal questions involved to the Attorney General, for his decision thereon.

These questions, as they occur to me, on examination, are principally the following:

1st. The act of July 27, 1861, makes an appropriation for the repayment to any State of the costs, charges, and expenses properly incurred by such State for enrolling, subsisting, &c., certain troops, and directs the Secretary of the Treas'y to make the payment, after the settlement of the account upon proper vouchers, by the accounting officers.

2. The amount directed to be thus paid by the Secretary of the Treasury is, by the express terms of the act, to be ascertained and fixed by a settlement by the accounting officers, "upon proper vouchers to be filed and passed upon by the proper accounting officers of the Treasury."

3. Such vouchers being for military services, must, of necessity, come from military officers and agents who are under the direction and control of the President, through the Sec'y of War, & not of the Sec'y of the Treas'y; and whose acts are subject only to control or revision by the President through the same Department; and such vouchers having be*ing* made and given by that Department, are binding upon every other Executive Department, and only liable to be reviewed or revised by that Department, or the President himself.

4. The act of July 27, 1861, conferred no power upon the Sec'y of the Treasury to prescribe any rules, restrictions, or limitations as to the effect or operation of the act. Sec'y Chase's rules are therefore simply void. If any such power resided anywhere, it was a military power in the President of the United States, and, by the law, his military duties are performed and his military power exercised, through the Department of War, & not through the Sec'y of the Treas'y.

5. It follows, therefore, that the decision by the Sec'y of War, as to the character, mode, and time of service of these troops, and their employment by the United States & under their authority was, in effect, the decision of the President of the United States, and as such, binding and conclusive upon all other Executive Departments of the Government. The acts of each Sec'y, within the sphere & scope of his Department, are the acts of the President, and where the acts of two Departments, as here, are in conflict, the President is made to differ with himself.

6. If ever any such power of restriction, limitation, & revision, as exercised by Sec'y Chase, and the present Sec'y of the Treasury, under the act of July 27, 1861, or any other act, existed, it was expressly taken away by the act of March 30, 1868, (15 Stat., 54,) which makes the decision of the accounting officers "final and conclusive upon the executive branch of the Government, and subject to revision only by Congress or the proper courts."

6 7. The proviso to the last-quoted act, and the 7th sect. act of June 25, 1868, (15 Stat., 76 & 77,) define and point out the rights and duties of a Sec'y or head of an Executive Department where he differs in opinion with the accounting officers. We submit, very re-

spectfully, that the act of March 30, 1868, is absolutely prohibitory of the course taken by the honorable Sec'y in this case. His duties, other than as pointed out by the acts of March 30, 1868, & June 25, 1868, above quoted, were purely ministerial, viz, to pay the amount found due by the official settlement.

8. We respectfully submit, further, that the rights of the State of Kentucky, resting, as her counsel believe, on these purely legal questions, should not be denied finally without the advice and concurrence of the highest law officer, and authority of the executive branch of the Government.

9. The rights and interests of a sovereign State being involved in these questions, and two seperate and distinct Executive Departments of the Government being in direct conflict with each other upon these rights and interests, such conflict can only be reconciled and adjusted by their reference to, and decision by, the proper constitutional adviser of the President and the heads of these differing Departments, upon the legal questions at issue.

10. We contend, as matter of fact, that the services for which the allowance in this case was made were within the terms of the rules prescribed by Sec'y Chase. The troops "were actually employed in the service of the United States," and "such expenditures were incurred at the request or under the authority of the President of the United States;" and that the decision of the Sec'y of War on these points was virtually & in effect the decision of the President of the United States, & not subject to be disputed, revised, reviewed, or disregarded by any other executive officer.

Some of the questions here stated are of great importance. I felt justified, under the circumstances, in only stating them at this time, until further advised of your wishes in the matter. Should you feel at liberty to take up the questions for revision or reconsideration, and desire it, I will be gratified to have the opportunity of presenting such arguments and authorities as I can to sustain these propositions, either orally or in writing, as you shall prefer.

If, on the other hand, you should determine at once to submit the questions involved for the opinion of the Att'y Gen'l, I will then refrain from troubling you with any further discussion of the case.

Very respectfully, your ob't s'v't,

JOS. CASEY,
Of Counsel for Kentucky.

(Indorsed:) Letter to Hon. G. S. Boutwell, Sec'y of the Treas'y, on the Kentucky war claim. Oct. 11, 1871.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
October 14, 1871.

SIR: I am in receipt of your letter of the 11th inst., in which you inform me that you have recently been appointed attorney and counsel for the State of Kentucky in the matter of her war claims. You then ask me to review and revise my decision upon the claim of that State for five hundred and twenty-five thousand two hundred and fifty-eight
7 dollars and seventy-two cents, ($525,258 72,) or in case I do not choose to re-examine the subject, you request me to submit the papers and evidence in the case to the Attorney General for his opinion.

It may not be known to you that, at the time the question whether the warrant should be issued or not was under consideration by me, the

State of Kentucky was very ably represented by Mr. Beck, Representative in Congress and by counsel specially employed by the State. Their oral arguments were patiently heard, and the arguments made in writing were read and carefully considered.

The opinion then given must be considered as the final disposition of the case as far as the Treasury Department is concerned, unless new and important evidence shall be presented by the State of Kentucky. No such evidence is tendered, and I must therefore decline to review the case myself, or to submit it to the Attorney General.

Very respectfully,

GEO. S. BOUTWELL,
Secretary.

Hon. JOSEPH CASEY,
Washington, D. C.

WASHINGTON, *October* 24, 1871.

To Hon. GEORGE S. BOUTWELL,
Secretary of the Treas'y, Washington D. C.

SIR: You will please take notice that, upon the petition and accompanying records, papers, and exhibits, copies of which are herewith served, we will, on Friday, the 3rd day of November, A. D. 1871, at the opening of the Supreme Court of the United States on that day, at their rooms in the Capitol, or so soon thereafter as counsel can be heard, move the said court for an order that a writ of mandamus issue out of said court, directed to you, and commanding you that you deliver to Preston H. Leslie, governor of the Commonwealth of Kentucky, or to his duly authorized agents, the Treasury warrant described and set forth in the said petition, dated June 30th, A. D. 1871, drawn upon the Treasurer of the United States, for the payment of five hundred and twenty-five thousand two hundred & fifty-eight dollars and seventy-two cents; the said sum being the amount found due the said Commonwealth of Kentucky from the United States by the final settlement and adjustment of the accounting officers of the United States, as the tenth instalment of the "war claim" of said State under the provisions of the act of Congress, approved July 27, 1861, entitled "An act to indemnify the States for expenses incurred by them in defence of the United States."

And also will, at the same time & place, move the said court for such other and farther orders, rules, and relief in the premises as the case may require and the said court may be pleased to grant.

Very respectfully, your obedient servants,

GEORGE R. McKEE, &
BARTLEY & CASEY,
Of Counsel for the Commonwealth of Kentucky.

WASHINGTON, *Nov.* 1, 1871.

Hon. GEORGE S. BOUTWELL,
Sec'y of Treas'y, Washington, D. C.

SIR: Referring to our notice given in the communication to you of the 24th October, in the matter of the "war claims" of the State
8 of Kentucky, we are advised that the Supreme Court of the United States will not be in session on Friday, the 3rd inst. We will therefore make the motion referred to on Thursday, the 2nd inst., and ask the said court to designate a time for the hearing of the same.

Very respectfully, your ob't s'v'ts,

BARTLEY & CASEY, &
GEORGE R. McKEE,
Of Counsel for K'y.

W. F. [S.

UNITED STATES OF AMERICA:

TREASURY DEPARTMENT, *October 17th*, 1871.

Pursuant to the act of Congress of the 22d February, 1849, I hereby certify that the annexed are true copies of original papers or records now in this Department.

In witness whereof I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed on the day and year first above written.

[SEAL.]

GEO. S. BOUTWELL,
Secretary of the Treasury.

(Copy.) [P.

TREASURY DEPARTMENT.

War.

To the Treasurer of the United States, greeting:

[Vignette.]

Pay to P. H. Leslie, governor, (care Fayette Hewitt, Q. M. gen'l of Kentucky, present,) or order, to be charged to the appropriations named in the margin, five hundred and twenty-five thousand two hundred and fifty-eight dollars and seventy-two cents, due State of Kentucky on settlement, pursuant to a requisition, No. 7156, of the Secretary of War, dated 30th June, 1871, countersigned by the Second Comptroller of the Treasury, and registered by the 3d Auditor. And for so doing this shall be your warrant.

Settlement warrant.

No. 1877.

$525,258 72.

Given under my hand and the seal of the Treasury Department this 30 day of June, in the year of our Lord one thousand eight hundred and seventy-one, and of independence the ninety-fifth.

Appropriations: Refunding to States exp's incurred in raising vol's, &c.

525,258 72.

[SEAL.]
C. F. C.

J. F. HARTLEY,
Acting Secretary.

Countersigned:

W'M HEMPHILL JONES,
Acting First Comptroller.

Registered:

Register.

OFFICE OF THE TREASURER OF THE UNITED STATES.

Received for this warrant the following draft:

No. on .
No. on .
No. on .

9 TREASURY DEPARTMENT, *August 3d*, 1871.

In obedience to the decision made by the Secretary of the Treasury, under date of the 2d instant, in reference to the claim to which this warrant relates, no payment can be made by virtue of this warrant.

GEO. S. BOUTWELL, *Sec.*

(Copy.) [Secretary Treasury.

Settlement requisition. [Jan. 20, 1871.

No. 7156.] [1877.

WAR DEPARTMENT. [Warrants.

To the Secretary of the Treasury:

SIR: Please to cause a warrant for five hundred and twenty-five thousand two hundred and fifty-eight dollars and seventy-two cents, to be issued in favor of the State of Kentucky, to be remitted to his excellency, P. H. Leslie, governor of said State, Frankfort, Kentucky, by the hand of Fayette Hewitt, Q. M. gen'l of Kentucky, present, due on settlement, as per certificate of Second Comptroller, No. 6827, to be charged to the undermentioned appropriations.

Given under my hand this 30th day of June, 1871.

W'M W. BELKNAP,
Secretary of War.

$525,258 72.]

S. B. P.
Countersigned June 30, '71.

J. M. BRODHEAD,
Second Comptroller.

Registered June 30, '71.
R. S. J.

A. M. GANGEWER,
Acting 3d Auditor.

APPROPRIATIONS.

Regular supplies of the Quartermaster's Department	
Incidental expenses of the Quartermaster's Department	
Horses for cavalry and artillery	
Barracks and quarters	
Transportation of the Army and its supplies	
Transportation of officers and their baggage	
Horses and other property lost in the military service	
Subsistence of the Army	
Refunding to States expenses incurred in raising, &c., volunteers, (act July 27, 1861)	$525, 258 72

T. E. G. P. No. 6827.

TREASURY DEPARTMENT,
THIRD AUDITOR'S OFFICE, *June* 24, 1871.

I certify that I have examined and adjusted the account of the tenth installment of the war claim of the State of Kentucky, and find her chargeable as follows, viz:

10 *Special settlement of the tenth installment under act to refund to the States expenses incurred in arming, raising, & subsisting vols. for the United States service, approved July 27, 1861.*

Date.		
1871.	DR.	
June 17.	To requisition No. 7081	$130,543 60
		$130,543 60
1817.	CR.	
June 15.	By balance on settlement No. 6660	$130,543 60
	By general account of moneys advanced: For this sum, being amount of vouchers admitted on special settlement of the tenth installment of her war claim, on affidavits and certificates filed by the State	$525,258 72
		$655,802 32
	Balance due the State	$525,258 72

For which balance ($525,258 72) found due the State, a requisition for $525,258 72 will issue in her favor, to be sent to the Treasury, and the amount remitted to his excellency P. H. Leslie, governor of said State, Frankfort, Kentucky, by the hand of Fayette Hewitt, q'rm'r gen'l of Kentucky, present, as appears from the statements and vouchers herewith transmitted for the decision of the Second Comptroller of the Treasury thereon.

(Signed) ALLAN RUTHERFORD, *Auditor.*

To JOHN M. BRODHEAD, Esq.,
Second Comptroller of the Treasury.

SECOND COMPTROLLER'S OFFICE.

I admit and certify the above balance this 30th day of June, 1871.

(Signed) J. M. BRODHEAD,
Second Comptroller.

Gen'l Sherman's statement.

WASHINGTON, D. C., *June* 30, 1871.

I certify that, prior to begin'ing the Atlanta campaign, I sent for Governor Bramlette, of Kentucky, to come to me in Nashville, and in May or April, 1864, revealed to him the plans and purposes of the campaign, and that I expected him, as the executive of Kentucky, to guard and protect our lines of supply, all of which came through Kentucky, and to guard against raids or invasions from the east or west.

He expressed his perfect willingness to do so, and on the whole our lines were and our success was thereby encouraged and ensured. My route, as is well known, was to Savannah, Geo., and thence to Washington, D. C.; so that I did not again see Governor Bramlett' till the war was over, and I never was able to ascertain how or in what man-
11 ner he disposed of his State militia to the end proposed; but I do regard his efforts as meritorious to the cause of the United States in a high degree.

(Signed) W. T. SHERMAN, *General.*

General Thomas M. Vincent, ass't adjutant general, to whom the claim was referred by the Sec'y of War, for examination and report, after referring to the various documents & proofs in the case, recommends "that the troops be recognized as having been actually employed in the service of the United States, that recognition being deemed necessary by the Treasury Department in order that the claim may be allowed under act of July 27, 1861, to indemnify the States for expenses incurred by them in defense of the United States."

On same day this report was marked "approved" by the Sec'y of War, & sent to 3rd Auditor & 2nd Comptroller.

(Indorsed:) Statement of Gen'l W. T. Sherman. Recommendation of Gen'l T. M. Vincent, ass't adj't gen'l. Approval of W. W. Belknap, Sec'y of War.

(Indorsement on cover:) No. 12. The Commonwealth of Kentucky, petitioner, vs. George S. Boutwell, Secretary of the Treasury of the United States. Original action. Filed 19 November, 1871.

12 Supreme Court of the United States. December term, 1871.

IN THE MATTER OF THE COMMONWEALTH OF Kentucky, ex rel. Preston H. Leslie, governor,
vs.
GEORGE S. BOUTWELL, SECRETARY OF THE Treasury of the United States.

Respondent's answer.—Filed 1st March, 1872.

13 To the honorable the Chief Justice and associate justices of the Supreme Court of the United States, now holding a term of said court at the city of Washington, in the District of Columbia:

George S. Boutwell, Secretary of the Treasury of the United States for return to the alternative writ of mandamus heretofore issued by said court against him on the petition and relation of the Commonwealth of Kentucky, by Preston H. Leslie, governor of said Commonwealth and ex-officio chairman of the board of commissioners of the sinking fund of said Commonwealth, respectfully *protests* [objects] against the jurisdiction of said court in the premises.

14 First. Because, as such Secretary of the Treasury, he is not subject under the law, in the discharge of the duties of his office in the premises, to the control, supervision, and direction of said court, inasmuch as by an act of Congress, approved the 27th day of July, A. D. 1861, entitled "An act to indemnify the States for expenses incurred by them in defence of the United States," it was enacted that the Secretary of the Treasury be, and he is hereby, directed, out of any money in the Treasury not otherwise appropriated, to pay to the governor of any State, or to his duly authorized agents, the costs, charges, and expenses properly incurred by such State for enrolling,

15 subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops employed in aiding to suppress the present insurrection against the United States, to be settled upon proper vouchers to be filed and passed upon by the proper accounting officers of the Treasury." By this act the respondent claims a discretion is given to

the Secretary of the Treasury in regard to any claims made under it. If this court commands him to do other than his judgment warrants in the discharge of his official duties in the premises under this act, such command would take from him the discretion and judgment placed in him thereby, and would render it impossible for him to perform
16 his duties as required and intended by the act, and would transfer to said court the discharge of his said duties, and the payment of said charges, costs, and expenses; and in this case, would subject the money of the United States in the Treasury of the United States to be taken therefrom by the judgment of said court.

Second. Because, by virtue of his office as Secretary of the Treasury of the United States, he is not subject to the control, direction, and supervision of this court in granting warrants for the payment of money out of the Treasury of the United States.

Third. Because this court has not original jurisdiction to
17 issue the writ of mandamus in this case, as prayed for by the relator, to the respondent in his official capacity as Secretary of the Treasury of the United States.

Subject to this protest against the jurisdiction of the court, the respondent shows that the then Secretary of the Treasury, to wit, in August, 1861, exercising the discretion given him by this act, when providing, under the terms thereof for the payment of claims for costs, charges, and expenses alleged to have been incurred by the States, prescribed a series of rules, the second of which is as follows:

"It is only for expenditures on account of troops, officers, or
18 men that have been or may be mustered and received into or actually employed in the service of the United States that reimbursements will be made.

"Organizations raised or attempted to be raised, but not mustered and received into nor actually employed in the service, will not be recognized; nor will any reim bursement be made by the United States of expenses incurred in organizing, equipping, and maintaining troops for State purposes, or home-guards, whether called out by State or other local authority, unless such troops were called out and such expenditures incurred at the request or under the authority of the President or the Secretary of War."

19 Under this rule adopted by the respondent he rejected the claim of the Commonwealth of Kentucky made under said act, and in making this decision it became, in his judgement, immaterial for him to consider, and, as he is advised, it is now immaterial to consider, whether the Commonwealth of Kentucky, by its proper, legal and constituted authorities in the several years 1863, 1864, 1865, and 1866, and during the pendency of the late insurrection against the United States, did, at her own proper cost and charge, and out of her own money, enroll, subsist, clothe, supply, arm, equip, pay, and transport a very large
20 number of troops and soldiers enlisted, raised, and organized by said Commonwealth of Kentucky within the territory and limits of said State as alleged, unless it had further appeared or shall appear that the said troops, if enlisted, raised, and organized—as alleged, which is not admitted—were mustered into the service of the United States, and unless such troops were called out and such expenditures incurred at the request or under the authority of the President or the Secretary of War; and the respondent denies that said troops were then and there during the years aforesaid, and during the pendency of the late insurrection, then existing against the United States, employed in aid-
21 ing to suppress said insurrection, and under the authority, direc-

Governor Bramlette, of Kentucky, to come to me in Nashville, and in May or April, 1864, revealed to him the plans and purposes of the campaign, and that I expected him, as the executive of Kentucky, to guard and protect our lines of supply; all of which came through Kentucky, and to guard against raids or invasions from the east or west.

32 "'He expressed his perfect willingness to do so, and on the whole, our lines were protected, and our success was thereby encouraged and insured. My route, as is well known, was to Savannah, Ga., and thence to Washington, D. C., so that I did not again see Governor Bramlette till the war was over, and I was never able to ascertain how or in what manner he disposed of his State militia to the end proposed, but I do regard his efforts as meritorious to the cause of the United States in a high degree.

(Signed) "'W. T. SHERMAN, *General.*'

"General Thomas M. Vincent, assistant adjutant general United States Army, in his communication dated June 30, 1871, after enumerating various documents filed in the case, recommends 'that

33 the troops be recognized as having been actually employed in the service of the United States, that recognition being deemed necessary by the Treasury Department in order that the claim may be allowed under act of July 27, 1861, to indemnify the States for expen-

[illegible] to cause a warrant for [illegible]

said State of Kentucky.

That said requisition was thereupon countersigned by the Second Comptroller, and registered by the Acting Third Auditor, on said 30th of June, 1871; but respondent denies that the Acting Secretary of the Treasury, Mr. Hartley, on the said 30th day of June, 1871, or on any other day, caused to be issued a warrant upon the Treasurer of the United States in favor of the State of Kentucky for the sum aforesaid, as alleged in said writ; but he says that, as he is informed and

24 believes, the facts in regard to said pretended warrant are these: On said 30th June, Fayette Hewitt, the agent of said State of Kentucky, about the close of business hours, applied to the chief of the warrant division in the office of respondent to prepare a warrant for said sum, and said chief declined to prepare such warrant at that time, unless specially directed to do so by the Acting Secretary; and said agent applied to said Acting Secretary, who determined not to issue such warrant, on the ground that, by the act of July 27, 1861, the matter was lodged specially in the discretion and judgment of the Secretary himself, who was absent, and that the propriety of

25 issuing said warrant would be determined by him on his return; but in view of the urgent request of said agent, and representations by him that, after said 30th of June, the appropriation would be no longer available for the payment of said claim, said Acting Secretary determined to confer with the officers of the Department, and, if deemed advisable and proper, to prepare and sign a warrant on said day in order to save the appropriation, which warrant should not be issued, nor registered or recorded, but should be retained in the office of said Acting Secretary, subject to approval or rejection by the Secretary on his return; and said Acting Secretary did accordingly call

26 together said officers at his office at about 8 o'clock on the evening of said day, and it was then and there agreed that a warrant should be prepared and signed, and should not be registered or delivered, but should be so retained and submitted to the Secretary on his return, to be by him approved and issued or cancelled, as he should determine; and said warrant was accordingly prepared and signed, and counter-

the Secretary of the Treasury in regard to any claims made under it. If this court commands him to do other than his judgment warrants in the discharge of his official duties in the premises under this act, such command would take from him the discretion and judgment placed in him thereby, and would render it impossible for him to perform
16 his duties as required and intended by the act, and would transfer to said court the discharge of his said duties, and the payment of said charges, costs, and expenses; and in this case, would subject the money of the United States in the Treasury of the United States to be taken therefrom by the judgment of said court.

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Third. Because this court has not original jurisdiction to
17 issue the writ of mandamus in this case, as prayed for by the relator, to the respondent in his official capacity as Secretary of the Treasury of the United States.

Subject to this protest against the jurisdiction of the court, the respondent shows that the then Secretary of the Treasury, to wit, in August, 1861, exercising the discretion given him by this act, when providing, under the terms thereof for the payment of claims for costs, charges, and expenses allowed to loyal men

The reasons which caused the respondent to reject the claim, and upon which he now relies in justification of his action were given in an opinion prepared by respondent August 2, 1871, as follows:

29 "This claim was filed in 1866, and it is made under the provisions of 'An act to indemnify the States for expenses incurred by them in defense of the United States,' approved July 27, 1861.

"Secretary Chase, when providing for the execution of this act, prescribed a series of rules, the second of which is in these words:

"'It is only for expenditures on account of troops, officers, or men that have been or may be mustered and received into, or actually employed in, the service of the United States that reimbursements will be made.

"'Organizations raised, or attempted to be raised, but not mustered and received into, or actually employed in, the service, will not be
30 recognized. Nor will any reimbursement be made by the United States of expenses incurred in organizing, equiping, and maintaining troops for State purposes, or home-guards, whether called out by State or other local authority, unless such troops were called out, and such expenditures incurred at the request or under the authority of the President or the Secretary of War.'

"It is not contended that the troops for whom reimbursement is asked were ever mustered into the service of the United States, nor is it contended that they were called out at the request or under the authority of the President or the Secretary of War.

"Upon these fact the rule quoted is a bar to the claim.

31 "It is, however, sought to bring the claim within the rule; and in support of this effort special reference is made to the certificate of General Sherman, the communication of General Vincent, and the approval of the Secretary of War. The certificate of General Sherman is as follows:

"'WASHINGTON, D. C., *June* 30, 1871.

"'I certify that, prior to beginning the Atlanta campaign, I sent for

Governor Bramlette, of Kentucky, to come to me in Nashville, and in May or April, 1864, revealed to him the plans and purposes of the campaign, and that I expected him, as the executive of Kentucky, to guard and protect our lines of supply; all of which came through Kentucky, and to guard against raids or invasions from the east or west.

32 "'He expressed his perfect willingness to do so, and on the whole, our lines were protected, and our success was thereby encouraged and insured. My route, as is well known, was to Savannah, Ga., and thence to Washington, D. C., so that I did not again see Governor Bramlette till the war was over, and I was never able to ascertain how or in what manner he disposed of his State militia to the end proposed, but I do regard his efforts as meritorious to the cause of the United States in a high degree.

(Signed) "'W. T. SHERMAN, *General.*'

"General Thomas M. Vincent, assistant adjutant general United States Army, in his communication dated June 30, 1871, after enumerating various documents filed in the case, recommends 'that

33 the troops be recognized as having been actually employed in the service of the United States, that recognition being deemed necessary by the Treasury Department in order that the claim may be allowed under act of July 27, 1861, to indemnify the States for expenses incurred by them in defense of the United States.

"On the same day the recommendation of General Vincent is approved, without comment, by the Secretary of War.

"The claimants offer as a precedent the order of Secretary Stanton of July 9, 1867, whereby he recognized certain troops who had been called into service in the State of Kentucky in 1861.

34 "There is, however, a manifest difference between the two cases. The troops whose services were recognized by Secretary Stanton were called into the service of the United States by General Nelson, who was then an officer of the United States, commanding under the President, and subject to the directions of the Secretary of War.

"Upon a well-understood principle, it was competent for the Secretary of War, or the President, to recognize these troops as having been called into service by proper authority, although neither the President nor the Secretary of War knew of the call until after it was made.

"The order of Secretary Stanton was specific. It met the points at issue, and placed the troops called out by General Nelson within

35 the second rule of Secretary Chase before quoted.

"It is as follows:

"'WAR DEPARTMENT, *July* 9, 1867.

"'It appears from official reports of Major General George H. Thomas that, on the 15th of September, 1861, the home-guards had been called out by General Nelson, and were then in the actual employment of the United States, and on duty as troops of the United States, and were continued on duty, and were employed by General Thomas. There appears to be in the War Department no written or official evidence of authority granted by the President, Secretary of War, or General Cameron to General Nelson for calling out these troops, but the legal presumption is (under the special circumstances then existing)

36 that proper authority was given.

"'This Department is, therefore, of opinion that the home-guards mentioned were actually employed in the service of the United

States under proper and legal authority, and should be regarded as such by the accounting officers of the Government.

(Signed) "'EDWIN M. STANTON,
"'*Secretary of War.*'

"In the case under consideration the troops were not called into service by the authority of the President or of the Secretary of War, or by any officer of the regular or volunteer Army of the United States; but they were in the service of the State of Kentucky by State authority, under officers appointed by the State, and, as far as is shown
37 by the evidence, they were never attached to the command of any officer of the Army of the United States.

"It appears to be true, as stated by Governor Bramlette and by General Lindsey, the adjutant general of Kentucky, that during the period mentioned the troops acted in concert with the United States forces, and regarded the orders of the United States officers.

"General Lindsey, in his affidavit of July 12, 1870, says that 'the troops referred to were directed in every way to co-operate with the United States troops, and to obey and carry out all orders and instructions given to them by United States officers.'

"A considerable portion of the service for which reimburse-
38 ment is asked was performed after the surrender of Lee and Johnston; and the mustering out of the troops was by the State authority, and at various times, from the 10th of January, 1865, until the 23rd of October of the same year.

"Adjutant General Lindsey says: 'That they were kept in service until those dates, owing to the unsettled condition of the country and the presence of armed bands of guerrillas, bushwhackers, and other outlaws; that the service of said troops until mustered out was regarded as essential to the peace and safety of the State, and they were mustered out of service as early as it was considered prudent to disband them.'

"The act of July 27, 1861, has received a legislative construc-
39 tion by the act approved July 17, 1862, (12 Stat., p. 600,) entitled 'An act to allow and pay to the State of Missouri the amount of money expended in said State in the arming and paying of troops employed in the suppression of insurrection against the laws of the United States.'

"In that act, provision is made for an allowance to the State of Missouri 'for all sums of money expended by said State in the arming, equipping, subsisting, and paying of troops organized under the ordinances of the convention of said State, passed during the year 1861, and employed in concert with the Federal authorities in suppressing insurrection against the United States, and enforcing the laws
40 thereof.' An act approved April 17, 1866, (14 Stat., p. 38,) entitled 'An act to reimburse the State of Missouri for moneys expended for the United States in enrolling, equipping, and provisioning militia forces to aid in suppressing the rebellion,' authorized the commissioners appointed to ascertain the amount of money expended by the State of Missouri,' * * * * 'allowing only for disbursements made and amounts assumed by the State for enrolling, equipping, subsisting, and paying such troops as were called into the service by the governor, at the request of the United States department commander commanding the district in which Missouri may at the time have been included.'

41 "The first statute referred to proceeds upon the theory that State troops employed to act in concert with the United States

troops could not be paid under the act of July 27, 1861; and the statute of April 17, 1866, is equivalent to a declaration that troops called into the service by the governor, though at the request of the United States department commander, could not be recognized under the act of July 27, 1861.

"The propriety and legality of the rules made by Secretary Chase have thus been recognized and affirmed by subsequent legislation.

"General Hewitt, agent for the State of Kentucky, in his written argument filed in the case, admits that the Secretary of the Trea-
42 sury, in recognizing the claim, must declare in effect that the second rule of Secretary Chase, already quoted, is invalid, as being contrary to law.

"General Hewitt, referring to the second rule, uses this language: 'The Treasury Department could make no rule to limit or restrict the operation of this act by requiring evidence of the performance of other conditions.

"'The second rule adopted under it must be construed by it; and if repugnant to it, the law prevails.

"'The first clause of the rule conformed to the law. It authorizes the payment of expenditures on account of troops actually employed in the service of the United States, but the last clause does not;
43 for nothing in the law requires that the troops should have been called out and the expenditures incurred at the request or under authority of the President or Secretary of War.'

"I agree that the claims cannot be paid if the second rule referred to is observed by the Secretary of the Treasury; but I do not admit that the rule in question was contrary to law, or that it limited unreasonably the scope of the statute.

"There are, however, two other sufficient answers to the suggestion.

"One is that the present Secretary of the Treasury would not be justified in setting aside a rule of his predecessor, unless the reasons requiring it are imperative. And, secondly, the rules were prepared
44 and made known to the country before any considerable expenses were incurred by the several States, and long before the expenses were incurred which are the basis of the claim under consideration.

"The State of Kentucky, therefore, in common with other States, had knowledge of the rules by which the Department would be governed in passing upon such claims as might be presented for the services of troops employed in suppressing the insurrection.

"Such is my conviction of the necessity for its occasional exercise that I shall do nothing calculated to impair the authority of the Department in this particular."

And respondent, while admitting that, on the 30th June 1871, there was ample and sufficient money in the Treasury of the United States to pay and satisfy the States for costs, charges, and expenses legally due them, under the act of July 27, 1861, for enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting troops employed in aiding to suppress the late rebellion against the
47 United States, denies that the money appropriated by said act of July 27, 1861, is now applicable to the payment of the said claim aforesaid, but alleges that said act was, by the act of July 12, 1870, repealed, said repeal to take effect from and after the 30th day of June, 1871; and that from that date the said appropriation, out of which said claim was to be paid, has not been, and is not now applicable to its payment, and that the money so appropriated can and is to be applied only to the payment of any dues, the payment of which may be duly authorized by the Congress of the United States.

And respondent denies that said State of Kentucky, by her
48 duly authorized agent, did demand of him, on the said 30th day of June, 1871, and at divers times thereafter, at his office at the Treasury Department, the delivery of the said warrant so made as aforesaid, and the payment to said governor or his agent of the said sum of $525,258 72, as alleged; but says that he considers it immaterial whether such demand was made as stated or not, inasmuch as this respondent would have issued the warrant whether formally demanded or not, if, after his return as aforesaid and his consideration of the question, he had not rejected the claim as before stated.

49 And respondent admits that, as Secretary of the Treasury of the United States, he refused to deliver the aforesaid warrant as alleged, and still refuses to do so, or to cause payment to the Commonwealth of Kentucky of the amount claimed to be due her as alleged, and denies that the mere making, signing, and delivery of such warrant is all that is required of him by the statutes in such cases; but, on the contrary, shows that the statutes authorized him, as Secretary as aforesaid, to grant such warrants, and that the granting of such warrants is not, in the meaning of the statute, solely and exclusively a mere ministerial act and duty, but one which requires, and was
50 intended to require, the exercise of judgment and discretion, in [illegible] premises [illegible] and employed in concert with the Federal authorities in suppressing insurrection against the United States, and enforcing the laws
40 thereof.' An act approved April 17, 1866, (14 Stat., p. 38,) entitled An act to reimburse the State of Missouri for moneys expended for the United States in enrolling, equipping, and provisioning militia forces to aid in suppressing the rebellion,' authorized the commissioners appointed to ascertain the amount of money expended by the State of Missouri,' * * * * 'allowing only for disbursements made and amounts assumed by the State for enrolling, equipping, subsisting, and paying such troops as were called into the service by the governor, at the request of the United States department commander commanding the district in which Missouri may at the time have been included.'

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(Indorsed:) No. 6. Original. The Commonwealth of Kentucky, petitioner, vs. George S. Boutwell, Secretary of the Treasury U. S. Respondent's answer. Filed 1st March, 1872.

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Judge Clifford

In the Supreme Court of the United States.

ORIGINAL No. , DECEMBER TERM, 1871.

THE

COMMONWEALTH OF KENTUCKY

VS.

GEORGE S. BOUTWELL,

SECRETARY OF THE TREASURY,

APPLICATION FOR A MANDAMUS.

BRIEF FOR KENTUCKY.

GEO. R. McKEE,
BARTLEY & CASEY,
Of Counsel for Relator.

WASHINGTON:
PRINTED BY POWELL, GINCK & CO.,
630 & 632 F STREET.
1871.

In the Matter of the "War Claims" of the State of Kentucky.

Washington, *October* 11, 1871.

Hon. Geo. S. Boutwell,
Secretary of the Treasury.

Dear Sir: Having recently been appointed attorney for the State of Kentucky in the matter of her "war claims," and having filed my letters of authority in the office of the Third Auditor, I beg leave to present the following suggestions:

In the first place, I very respectfully ask you to review and revise your decision in the case of the warrant issued to that State on the 30th day of June, A. D. 1871, for five hundred and twenty-five thousand two hundred and fifty-eight dollars and seventy-two cents ($525,258 72), for money paid to State militia for services rendered during the years 1863, 1864, 1865 and 1866. Or should you feel so firmly settled in your opinion of the law and facts involved in the case, as to probably preclude your reaching any other conclusion than that already attained, then I respectfully ask that you will submit the very important legal questions involved to the Attorney General for his decision thereon.

These questions, as they occur to me on examination, are principally the following:

1. The act of July 27, 1861, makes an appropriation for the repayment to any State of the costs, charges and expenses, properly incurred by such State, for enrolling, subsisting, &c., certain troops, and *directs* the Secretary of the Treasury to make the payment after the settlement

of the account upon proper vouchers, by the accounting officers.

2. The amount directed to be thus paid by the Secretary of the Treasury is, by the express terms of the act, to be ascertained and fixed by a settlement by the accounting officers "upon proper vouchers, *to be filed and passed upon* by the proper accounting officers of the Treasury."

3. Such vouchers being for military services, must of necessity, come from military officers and agents, who are under the direction and control of the President, through the Secretary of War, and whose acts are subject only to control or revision by the President, through the same department. And such vouchers being made and given by that department, are binding upon every other executive department, and only liable to be reviewed or re-revised by that department or the President himself.

4. The act of July 27, 1861, conferred no power upon the Secretary of the Treasury to prescribe any rules, restrictions or limitations as to the effect or operation of the act. Secretary Chase's rules in this regard are, therefore, simply void. If any such power resided anywhere, it was a military power in the President of the United States, and by law his military duties are performed, and his military power exercised through the Department of War and not through the Secretary of the Treasury.

5. It follows, therefore, that the decision by the Secretary of War as to the character, mode and time of service of these troops, and their employment by the United States, and under their authority was, in effect, the decision of the President of the United States, and as such, binding and conclusive upon all other executive departments of the Government. The acts of each secretary, within the sphere and scope of his department, are the acts of the President, and where the acts of two departments, as here, are in conflict, the President is made to differ with himself.

6. If ever any such power of restriction, limitation and revision as exercised by Secretary Chase and the present Secretary of the Treasury, under the act of July 27, 1861, or any other act, existed, it was expressly taken away by the act of March 30, 1868. Stat. 54, which makes the decision of the accounting officers "*final and conclusive upon the executive branch of the Government, and subject to revision only by Congress or the proper courts.*"

7. The proviso to the last quoted act, and the 7th section of the act of June 25, 1868, 15 Stat., 76–77, define and point out the rights and duties of a secretary or head of an executive department, where he differs in opinion with the accounting officers. We submit, very respectfully, that the act of March 30, 1868, is absolutely prohibitory of the course taken by the honorable secretary in this case. His duties other than as prescribed by the acts of March 30, 1868, and June 25, 1868, above quoted were purely ministerial, viz., to pay the amount found due by the official settlement.

8. We respectfully submit further, that the rights of the State of Kentucky resting, as her counsel believe, on these purely legal questions, should not be denied finally without the advice and concurrence of the highest law officer and authority of the executive branch of the Government.

9. The rights and interests of a sovereign State being involved in these questions, and two separate and distinct executive departments of the Government being in direct conflict with each other, upon these rights and interests, such conflict can only be reconciled and adjusted by their reference to and decision by the proper constitutional adviser of the President and the heads of these differing departments, upon the legal questions at issue.

We contend as matter of fact, that the services for which the allowance in this case was made, were within the terms of the rules prescribed by Secretary Chase.

The troops "were actually employed in the service of the United States." And "such expenditures were incurred at the request or under the authority of the President of the United States." And that the decision of the Secretary of War on these points, was virtually and in effect the decision of the President of the United States, and not subject to be disputed, revised, or disregarded by any other executive officer.

Some of the questions here stated are of great importance. I felt justified under the circumstances in only stating them at the present time, until further advised of your wishes in the matter. Should you feel at liberty to take up the questions for revision or reconsideration, and desire it, I will be gratified to have opportunity of presenting such arguments and authorities as I can, to sustain these propositions, either orally or in writing as you shall prefer.

If on the other hand, you should determine at once to submit the questions involved for the opinion of the Attorney General, I will then refrain from troubling you with any further discussion of the case.

Very respectfully, your obedient servant,

JOS. CASEY,

Of Counsel for Kentucky.

TREASURY DEPARTMENT,

OFFICE OF THE SECRETARY, *October* 14, 1871.

SIR: I am in receipt of your letter of the 11th inst., in which you inform me that you have recently been appointed attorney and counsel for the State of Kentucky in the matter of her war claims. You then ask me to review and revise my decision upon the claim of that State for five hundred and twenty-five thousand two hundred and fifty-eight dollars and seventy-two cents, ($525,258 72,)

or in case I do not choose to re-examine the subject, you request me to submit the papers and evidence in the case to the Attorney General for his opinion.

It may not be known to you, that at the time the question whether the warrant should be issued or not was under consideration by me, the State of Kentucky was very ably represented by Mr. Beck, representative in Congress, and by counsel especially employed by the State. Their oral arguments were patiently heard, and the arguments made in writing were read and carefully considered.

The opinion then given must be considered as the final disposition of the case as far as the Treasury Department is concerned, unless new and important evidence shall be presented by the State of Kentucky. No such evidence is tendered, and I must therefore decline to review the case myself or to submit it to the Attorney General.

Very respectfully,

GEO. S. BOUTWELL,

Secretary.

Hon. JOSEPH CASEY,

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GEO. S. BOUTWELL,

Secretary.

Hon. JOSEPH CASEY,

Washington, D. C.

Brief of Argument on the Right and Power of the Secretary of the Treasury to withhold the Warrant.

The power and authority conferred upon the Secretary of the Treasury by the act of July 27, 1871, is in the following clause:

He is thereby "*directed out of any money in the Treasury, not otherwise appropriated, to pay to the governor of any State, or to his duly authorized agents, the costs, charges,*" &c. Did Congress, by making the appropriation, and commanding the Secretary of the Treasury to pay the money, intend to give him any power or authority over the settlement? Or give him any right to impose rules, limitations, restrictions or conditions upon the payment? The formula of words adopted in the act, that the Secretary of the Treasury be, and he is hereby, directed, out of any money in the Treasury, not otherwise appropriated, to pay the governor," &c., is not different from that of a thousand other appropriations, in which the Secretary of the Treasury has nothing more than a ministerial duty to perform, as the legal custodian of the public money. The same form of words applied to the appropriation to pay for the construction of a naval vessel, or the erection of a military fort, or purchase of naval or military stores and supplies, could not by any reasonable construction be held to take the control and management of these affairs out of the hands of the Navy and War Departments respectively, and transfer them to the Treasury Department. In this latter event, the Treasury Department would be compelled to exercise its supervision and control through the War and Navy Departments, for it has not the necessary machinery, knowledge and skill to the performance of such duties within itself. The law not having *usually* cast military or naval duties upon the

Treasury Department, has not furnished it with the means and appliances for performing them.

Such a supervision and control by the Treasury Department, would also imply that the others were subordinate and inferior, instead of co-ordinate and co-equal departments. Such a principle would cause jealousy and conflict among the various executive branches of the Government, and impair and finally destroy the harmony, efficiency and consistency of the system.

The duties of the Secretary of War are first defined by the act of August 7, 1789. 1 Stat., 49, 1 Bright Dig., 899, pl. 1. He is to exercise such duties as shall be required by the President, "agreeably to the constitution, relative to military commissions *or to the land forces*, ships or warlike stores of the United States, or to such other matters respecting military affairs as the President of the United States shall assign to said department, and shall conduct the business of the said department in such manner as the President of the United States shall, from time to time order and direct."

By act of January 31, 1862, sect. 4, 12 Stat., 334, 2 Bright Dig., 551, pl. 1, it is provided "that the transportation of troops, munitions of war, equipments, military property and stores throughout the United States, shall be under the immediate control and supervision of the Secretary of War and such agents as he may appoint, and all *rules and regulations, articles and usages, and laws in conflict with this provision, are hereby annulled.*"

The powers and duties of the Secretary of the Treasury are defined and prescribed by the act of September 2, 1789, 1 Stat., 65, 1 Bright Dig., 879, Pl. 1 et seq. The conclusion of the whole matter is summed up in the concluding sentence of the 1st section of this act, "and generally to perform all such services, *relative to the finances*, as he shall be directed to perform."

The 9th section of the act of May 8, 1792, 1 Stat., 280,

1 Bright Dig., pl. 5, provides "the *forms* of keeping and rendering all public accounts whatsoever, shall be prescribed by the Department of the Treasury."

It will be seen that among the duties of the Secretary of the Treasury, specially enumerated in the law is that "to grant under the limitations herein established, or to be hereafter provided, all warrants for moneys to be issued from the Treasury, in pursuance of appropriations by law."

Now, it appears to me that in the light of these laws, in connection with the act of July 27, 1861, and subsequent legislation, the respective rights, powers and duties of the Treasury Department, the War Department and the accounting officers are plain and manifest.

The Secretary of the Treasury under the act of May 8, 1792, sec. 9, 1 Stat., 280, above quoted, has the right and power to prescribe the *forms* of keeping and rendering these accounts of the States. And so far as Secretary Chase's rules relate to the *form of keeping and rendering the accounts*, they are within the scope of his authority. This has regard to the manner and form of the accounts, and their adjustment alone; and has no relation whatever to the subject matter of those accounts. If it had, it would undoubtedly confer upon the Secretary of the Treasury the power claimed here to exercise a supervisory, reviewing and revising power over all public accounts for expenditures of every kind, in every department of the government. That such was not the intention of the acts, I hope to make manifest by the highest authorities. In this connection, I will only, for the present, refer to the phraseology of the act of July 27, 1861, under which this settlement was made. The expenses incurred, &c., to be settled *upon proper vouchers*, to be filed and passed upon by the proper accounting officers of the Treasury." Such vouchers must be for expenses incurred by the respective States, for "enrolling, subsisting, clothing, sup-

plying, arming, equipping, paying and transporting its troops employed in aiding to suppress the present insurrection against the United States." Whether such troops were employed in aiding to suppress the insurrection, could only be known to and decided by the War Department and the military officers under its control and direction. The employment and services are purely military and their nature, character and value could only be decided by military rules and authority. And this service and employment would be evidenced by reports, returns and other official documents, made by military officers to the War Department, and contained in its archives. The reasonableness of the payments made by the State, for the various matters embraced in the act, could be judged of more accurately by the War Department than any other, by comparing them with prices and amounts paid by the War Department for similar services and supplies. Besides, the act of January 31, 1862, sec. 9, 12 Stat., 334, gave in direct terms, "the immediate *control and supervision*" of "the transportation of troops, munitions of war, equipments, military property and stores throughout the United States," to the Secretary of War and such agents as he might appoint. Under the acts cited, it is very evident, and appears to me very clear, that as the accounting officers were a part of the Treasury Department, Congress intended that the Secretary of that Department should prescribe the forms of keeping and rendering all public accounts. That they intended in any statute to give him the right to sit in judgment upon the acts of other secretaries in the allowance of accounts for expenditures in their Departments, and appropriate to their peculiar functions and duties, cannot, I think, be successfully maintained.

If I am right in the positions here assumed, it follows that in the settlement, allowance and payment of the war claims of the States under the act of July 27, 1861, there

were separate, distinct and independent, but concurring duties to be performed by several distinct departments and functionaries of the Government, before the payment of the money could be finally made.

1st. The Secretary of the Treasury, under act of 1792, prescribes the form of keeping and rendering the accounts.

2d. The Secretary of War decides whether the expenses were properly incurred by such State, for "troops employed in aiding to suppress the insurrection against the United States."

3d. The accounting officers, the auditor and comptroller, decide whether the expenses were actually made, whether the amounts are correct, and whether the vouchers are genuine and the accounts are in proper form; and determine and certify the amount found to be due.

4. Being for expenditures in the War Department, and payable out of the appropriations made to Congress for that Department the balance found due is to be certified to the Secretary of War, by the accounting officers, who, before a warrant can issue for its payment, issues his requisition upon the Secretary of the Treasury for the amount. This requisition is countersigned by the comptroller.

5. Then the Secretary of the Treasury, as the legal custodian of the public funds issues his warrant, upon the Treasurer of the United States, to pay this requisition of the Secretary of War. This warrant is recorded by the Register of the Treasury.

Can the Secretary of the Treasury at this stage of the proceedings, lawfully intervene to suspend or defeat the payment of this warrant? Such a claim appears to me totally inadmissible, as being contrary to the plain provisions of the acts of Congress already quoted, and confronted with the positive and distinct interdictions of later legislation, the opinions of the ablest officers of the Government, and the almost unbroken usage of the Goverment for nearly a century. It must be remembered

that the claim is not here the usual one of the head of an executive department, claiming the right to revise and change the findings of the accounting officers, in a matter within his own department. But the claim now is, that the Secretary of the Treasury may so revise and defeat these findings, in any case, and from any department. For a power so transcendent as this, there ought surely to be some clear and distinct warrant. If any such exists in the laws of Congress, I have failed to find it.

The act of September 2, 1789, §5, makes it the duty of the auditor, "to receive all public accounts, and after examination, to certify the balance, and transmit the accounts, with the vouchers and certificates, to the comptroller for his decision thereon," and it is provided "that if any person whose accounts shall be so audited, be dissatisfied therewith, he may, within six months, appeal to the Comptroller against such settlement. By section 3 of the same act it is made the duty of the comptroller "to examine all accounts settled by the auditor and certify the balances arising thereon to the register;" and by section 6, the duty of the register is defined to be "to receive from the comptroller the accounts which shall have been finally adjusted, and to preserve such accounts with their vouchers and certificates." By a further provision the register was to furnish the secretary with copies of the comptroller's certificates of balances, and the moneys so found due were to be drawn from the Treasury by warrants from the secretary, countersigned by the comptroller and recorded by the register.

The act of 1817 preserves the system of the auditing and revising of accounts established by the act of 1789. Some of the duties were transferred and distributed among other officers. The 5th section makes it the duty of the auditors named to receive from the Second Comptroller, the accounts which shall have been *finally adjusted*, and to preserve such accounts, with their vouchers, certificates

&c. The act of Febuary 24, 1819, transferred the settlement of accounts arising out of Indian Affairs from the Fifth to the Second Auditor, who is directed to receive from the comptroller the accounts that shall have been *finally adjusted* and preserve such accounts with their vouchers and certificates."

There are very many acts of Congress confering *special* powers upon the accounting or other officers of the Government, in special cases and giving a power of revision to the President or some other officer. Indicating in this way, that but for such special power no such right would exist.

Thus by the act 21st February, 1823, authority was given to "the proper accounting officers of the Treasury to adjust and settle the accounts and claims of Daniel D. Tompkins, late governor of the State of New York, on principles of equity and justice, subject to the revision and final decision of the President of the United States."

The act of March 1, 1823, 3 Stat., where it made provision for special adjustments, and provided that where the accounting officers differed, the case should be referred to the Secretary of War, whose decision should be conclusive.

In 1823, Congress passed an act directing the accounting officers "to settle and adjust the account of Joseph Wheaton, while acting in the Quartermaster's Department, upon the principles of justice and equity."

Mr. Wheaton was dissatisfied with the settlement made by the accounting officers, and applied to the President to revise and change their findings. The President referred this application to Mr. Wirt, then Attorney General, who gave an elaborate opinion, holding that the President had no right to interfere. His opinion is summed up in the following paragraph:

"My opinion is that the settlement of accounts of individuals by the accounting officers appointed by law is final and conclusive so far as the executive department of the

Government is concerned. If an individual feels himself injured by such settlement his recourse must be to one or the other two branches of the Government—the legislative or judicial. If a balance be found against him by the disallowance of credits which he deems just he may refuse payment and abide a suit, in which case he will have the benefit of a court and jury. If a balance be found in his favor, but smaller than he thinks himself entitled to, his appeal is to Congress, where the representatives of the people will pass upon his claim."

1st Opinions Attorney General, p. 624.

On the 17th of January, 1824, on the application of Joseph Wingate to the President to have an allowance which the accounting officers had rejected, Mr. Wirt refers to his former opinion in the case of Major Wheaton, and advises the President that he has no right to interfere in the settlement of public accounts.

1st Attorney General's Opinions, p. 636.

And on the 27th of July, 1824, on reference to him by the President of an application by Elbert Anderson to have a credit allowed which the accounting officers rejected, Mr. Wirt re-affirmed his former opinions as follows:

"I beg leave to call your attention to an elaborate opinion which I had the honor to address you on the 20th of October last in the case of Major Joseph Wheaton, who sought to draw from you some instructions to the accounting officers relative to the settlement of his accounts.

In that case, after reviewing fully the organization of the accounting department; after scanning with care the language of our laws in relation to the operation of that department; after looking at the nature of the office of the President of the United States, the character of the duties devolved upon him, and the utter impossibility of his sitting in appeal over accounting officers of the Government, or superintending and directing their operations, I gave it as my opinion, that he had nothing to do with the

settlement of public accounts, either in form of direction to accounting officers *a priori*, or revision and reversal *a posteriori*; that his interference with this business, so far from being required by law, *would be a usurpation on the part of the President*, which the accounting officers would not be bound to respect, except it were (as in in the case of Gov. Tompkins) expressly ordered by the particular law to act under the direction and order of the President."

1st Opinions Attorney General, p. 678.

On the 19th of February, 1825, in the cases of Hull & McKenny, he re-affirmed this doctrine to the full extent.

1st Opinions Attorney General, p. 705, 706.

On the 5th of April, 1832, the late eminent Chief Justice of the Supreme Court of the United States, when Attorney General of the United States, on reference of the accounts of General Taylor, affirms Mr. Wirt's view, and sums up his review of the laws and their intent as follows:

"These laws, as well as those which preceded them on the same subject, appear to me not to contemplate any appeal to the President, *and I think, therefore, that the decision of the comptroller in this case is conclusive upon the executive branch of the Government*, and that the President does not possess the power to enter into the examination of the correctness of the account, for the purpose of taking any measures to repair the errors which the accounting officers, appointed by law, may have committed. The party who supposes justice has not been done to him, must seek relief in court, where a suit is brought against him, or may bring his claim to the consideration of Congress; and those, in my opinion, are the only means of redress left to Gen. Taylor, if the accounting officers have erred in their decision."

2d Opin. Atty. Gen., p. 507.

These opinions of Attorneys General Wirt and Taney,

were acted upon by Presidents Jackson, Van Buren, Tyler, Polk and Filmore.

In 1835, Peebles and Gorham, contractors, applied to the President to change the finding of the accounting officers, and direct them to make the contractors certain allowances. The President referred the matter to the Secretary of War, who made a report. The opinion of the President, in his own handwriting, is endorsed on this report, filed in the 3d Auditor's Office, as follows:

"The report made. Attorney General's opinion referred to. The decision of the Second Comptroller is final, over whose decisions the President has no power, except by removal. The Secretary of War will make known this decision to Mr. Peebles.

A. J."

In October, 1841, during President Tyler's administration, Clement, Bryant & Co., applied to have the opinion of the Attorney General taken by the President, and their accounts settled by the accounting officers. Mr. J. C. Spencer, an eminent lawyer himself, was then Secretary of War, and on reference to him of the application by the President, he, on October 23, 1841, advised in accordance with the opinion of Mr. Wirt in 1823, "that the accounting officers of the Treasury constituted a judicial tribunal," and that no appeal lay to the President.

The same parties applied, in reference to the same account to President Polk. He declined to interfere, and made the following endorsement:

"I have considered the application in the case to open the accounts of Bryant, Clements & Co., and decline to interfere upon the ground that Congress has expressly given the authority to settle the claims to the accounting officers of the Treasury Department, and that I have no right to control these officers in the performance of their duty."

J. K. POLK."

August 9, 1845.

On the 12th of September, 1850, Attorney General Crittenden, in an opinion to the President, said:

"My clear conviction is, that the decision of the comptroller on this claim, is *final and conclusive upon all the branches of the executive Government*; that the law allows no appeal to you, and gives you no power to exercise or interfere with the decision for any purpose of controlling, correcting or altering it." He then refers to the opinion of Mr. Wirt, above cited, and says: "I concur in that opinion, and refer to it as eminently worthy of perusal; it contains a citation of all the acts of Congress that relate to the subject, and an argument to which nothing can be added." President Filmore thereupon endorsed upon it, as follows:

"I have not the opinions of the Attorney General, but doubt not the correctness of the conclusion of Mr. Attorney General Crittenden, and therefore return the papers to the Second Comptroller *whose decision is conclusive.*"

September 12, 1850.

MILLARD FILMORE."

Since this time, there have been various opinions of Attorneys General and heads of executive departments on the subject. And several Attorneys General have held, and among them, Berrien, Johnson, Cushing, Bates and Stanbury, that the head of the appropriate executive department had the authority to direct and control the accounting officers in the allowance of a claim, originating and accruing in such department; and that where a claim, payable out of an appropriation made for such department, was allowed by the accounting officers against the judgment and opinion of the head of the department, the latter might lawfully refuse to sign and issue a requisition for the payment of such claim.

Attorney General Stanbury, Sept. 15, 1866, 12 Opinions, 43.

Attorney General Bates, April 25, 1862, 10 Opinions, p. 435.

Attorney General Crittenden, 5 Opinions, 636, and others referred to in Attorney General Stanbury's Opinion.

But I am not aware that any of these distinguished legal gentlemen ever held the opinion that the Secretary of the Treasury might exercise the power claimed here, in a matter entirely foreign to his own department. This power, if it exists, makes him of necessity, the ultimate and supreme arbiter in the allowance or rejection of every claim, account or demand on the Government, in all its departments. More than all, it gives him a power which the ablest jurists of the country are agreed is not possessed by the President of the United States, and if the President does not possess the power in himself, it is difficult to see how he can exercise it through the Secretary of the Treasury; for in contemplation of law, every valid act of the head of an executive department, in its administration, is the proper act of the President himself.

Under these somewhat differing and disagreeing opinions and practices, it was somewhat difficult to tell on which side the weight of authority and usage lay.

In November, 1867, a controversy sprang up between the Quartermaster General and the Second Comptroller, in relation to the account of W. G. Richardson, under a charter-party. The comptroller certified to the Secretary of War, a balance of $1,382 32. The Quartermaster General, to whom the certificate was referred by the Secretary of War, reduced this amount to $973 35, and the secretary issued a requisition for this reduced amount, and returned it to be countersigned by the Second Comptroller. The Second Comptroller, Hon. John M. Broadhead, in a communication dated November 5, 1867, to the then acting Secretary of War, General U. S. Grant, reviewed in a most able and comprehensive manner the questions involved, refusing to countersign the requisition for the reduced amount, and proposed to submit the questions to

Congress for their determination. In this, the distinguished Secretary of War concurred, and transmitted the correspondence to Congress.

The subject was taken up there and carefully considered and thoroughly canvassed and discussed, and resulted in the passage of the act of March 30, 1868, 15 Stat., 54, sustaining, in every respect, the positions assumed by the comptroller.

That act is as follows:

"That the act of March 3, 1817, entitled
provide for the prompt settlement of public accounts
shall not be construed to authorize the heads of departments to change or modify the balances that may be certified to them by the Commissioner of Customs or the Comptroller of the Treasury, but that such balances when stated by the auditor, and properly certified by the comptroller, as provided by that act, shall be taken and considered as final and conclusive upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts, *provided*, that the head of the proper department, before signing a warrant for any balance, certified to him by a comptroller, may submit to such comptroller any facts in his judgment, affecting the correctness of such balance, *but the decision of the comptroller thereon, shall be final and conclusive, as hereinbefore provided.*

Following close upon this law was the act of June 25, 1868, §7, 15 Stat., 76, 77. This made the system complete. A method was provided by which a judicial decision could be had in every case in which disputed facts or controverted questions of law were raised. And especially where there was a difference of opinion on those questions of law and fact, between the executive officers of the government entrusted with the allowance and settlement of claims. But it will be observed that in devising and arranging this system, intended to be harmonious and com-

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That act is as follows:

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plete, no provision is made for any action by the Secretary of the Treasury when a requisition in due form from another department is presented for a warrant. The only power that appears to be contemplated by Congress, that he shall exercise over accounts and claims from other departments, is to send them to the Court of Claims, when the auditor or comptroller shall certify to him that they involve disputed facts or controverted questions of law, proper to be judicially examined and decided.

With these acts of March and June, 1868, the Secretary of War appears to have been dissatisfied. He thereupon in December, 1868, brought the subject again before Congress, asking that these acts should be modified or repealed.

This communication of the secretary, was in the House of Representatives, referred to the committee on the revision of the laws. That committee, through Judge Poland, an eminent jurist, on the 16th of February, 1869, made a report. In that report, Judge Poland reviews, in a very clear and able manner, the laws of Congress, and the usage of the Government under them from the foundation of the Government till that time. They also bring into view the history of the conflicts of opinion and contests between various executive officers, on these laws at different times. But conclude that the weight of usage, reason and authority, even before the act of 1868, under the acts of 1789 and 1817, was decidedly in favor of the finality and conclusiveness of the settlement of the accounting officers. And that under these laws neither the President nor the heads of the departments, had any right to alter, revise or disregard the settlement made by these functionaries. And conclude that the act of March 30, 1868, was but the reiteration by Congress in more clear, distinct and positive terms, of its previously expressed will and intention. And the committee conclude that the act of March 30, 1868, should therefore stand as the true ex-

pression and exponent of the law-making power. The committee conclude their report with these emphatic words, "*That the act* (of March 30, 1868,) *was just and wise, and that no necessity exists for its repeal or modification.*"

I have thus attempted to group and bring into one view the leading facts which form the history of the conflicts, and differences of opinions upon this subject. My object in doing so, was to point out more clearly and plainly, if possible, than the words of the act themselves do, the objects, purpose and intention Congress entertained in the passage of the act of 1868. From the light this history sheds upon it, as well as from the plain, explicit and unmistakable terms of the act itself; and from the direct refusal of Congress to modify, change, explain or repeal the act itself, I think I am fully justified in saying that Congress clearly intended that the settlement of public accounts, such as the present, should be vested solely, exclusively and finally in the accounting officers, without interference, control or revision by any other executive officer.

Under this law all that the head of an executive department can do with a balance on account certified by the auditor and comptroller, is either to issue the requisition for this balance, without abatement or change, or to return it to the comptroller with such facts as in his judgment may affect the correctness of such balance; or to certify the case to the Court of Claims under the 7th section of the act of June 25, 1868.

Nothing of the kind was done in this case. On the contrary, the Secretary of War, in whose department the claim originated, is, so far as appears in the case, entirely satisfied with the settlement, and has issued his requisition for the amount. So far the case is plain. That requisition is countersigned by the comptroller. And this requsition, all in due form, is sent to the Secretary of the Treasury, for a warrant on the Treasurer for

its payment. That warrant is issued, but withheld. Its delivery is suspended because the secretary believes the account wrong, and the balance for more than is legally due to the State of Kentucky. And the question presented is whether the honorable secretary has any legal power to withhold such warrant. In other words, are his duties in the premises such as involve judgment, deliberation, decision, option or discretion? Or are they merely ministerial to carry out and pay the sum which the law finds due in the case? I think the latter is clearly the true and only interpretation that can be given to the acts cited. The honorable secretary in his opinion filed in this case says, upon this point: "Every Secretary of the Treasury, as far as I am informed, has practially recognized it to be his duty to pass upon all claims, as far as they are brought to his notice; and in no instance in the history of the Government has this power on the part of the Secretary of the Treasury been waived. Such is my conviction of the necessity for its occasional exercise that I shall do nothing calculated to impair the authority of the department in this particular."

This goes the entire length. It claims a complete revisory power, or a negative upon the action of the accounting officers on the balance found in every case, in every department of the Government. And in accordance with this claim, the much larger part of the opinion is an argument against allowing it on its merits. This opinion, and the act of March 30, 1868, I very respectfully submit, cannot stand together. If the action of the accounting officers is to be "final and conclusive" upon the executive branch of the Government, the Secretary's action s in direct conflict with that provision. For that which can be suspended, annulled or postponed is not *final* in any sense of that word. It is not *conclusive* of anything.

Without that act I think the only thing that could be claimed would be that the Secretary of War, to whose

department it belonged, might revise or suspend the settlement. My examination leads me to believe, that the power given to the Secretary of the Treasury to issue the warrants for balances found due upon accounts and claims in other departments, has never been held by any recognized authority, executive, legislative or judicial, as conferring upon him, the right to determine the justice, validity or amount of such claims,or revise, control or change the settlements, by which such balance was arrived at.

In such a case, where anything affecting the legality, justice or amount of the balance certified comes to the knowledge of the secretary, he doubtless might and ought to refrain from issuing the warrant, and call the attention of the accounting officers, or head of the proper department to the facts. But that is not what was done, or the right claimed here. That is nothing more nor less than a right to review and reverse the decision of the Secretary of War and the accounting officers, on the balance found due, on a military claim arising in and decided favorably by the War Department, sanctioned and certified by the accounting officers, and payable out of an appropriation made by Congress for the War Department.

For a power so extensive, not to say supreme, no other authority is cited than *usage*. I admit the very great and controlling effect of *usage or custom* in many things. The immemorial *customs or usages* of a government, association or people, enter into and become a part of their daily life, habits and business. But one of the essential elements of a custom or usage is, that it shall be *legal*. A custom or usage to violate or disregard a positive statute, would be a legal anomaly. So far from such being a custom or usage at all, it is a mere violation of the law. And no number of infractions of a statute can work its abrogation or repeal. Against the plain words of a statute, no usage or custom can be interposed; else we should be involved in the absurdity that the same acts at last become legal by being very often unlawful.

The statements made and the citation of authorities show that the thing we demand of the Honorable Secretary of the Treasury is a purely ministerial act, involving no option: no right to revise the settlement made by the accounting officers: no power to reverse and annul the decision of the Secretary of War: no control over the settlement and allowance in character, legality or amount, The only other questions that remain are—

1st. Whether mandamus be the proper and appropriate remedy. And, if so—

2d. Whether this court has original jurisdiction of the action.

In the case of *The United States* vs. *Guthrie*, 17 How., 284, the principle is lucidly and concisely stated by Mr. Justice Daniel, p. 304: "Thus it has been ruled that the only acts to which the power of the courts by mandamus extends are such as are purely ministerial and with regard to which nothing like judgment or discretion in the performance of his duties, is left to the officer; but that whenever the right of judgment or discretion exists in him, it is he, and not the courts, who can regulate its exercise."

In *Marbury* vs. *Madison*, 1 Cranch, 137, Chief Justice Marshall says:

"The province of the court is solely to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform their duties in which they have a discretion. Questions, in their nature political, or which are by the Constitution and laws submitted to the executive, can never be made in this court."

"*But mandamus is a proper remedy where a person has a legal right to insist that a certain act shall be done, the performance of which is, by law, made the duty of a public officer.*"

That is our case here precisely. We have a right to the delivery of the warrant. It is made the duty of the Secretary by law to deliver it.

In *Marbury* vs. *Madison*, above quoted, it was held that the signing and delivery of a commission to a public officer, after his confirmation by the Senate, and commission signed by the President, were purely ministerial acts which the law enjoined upon the Secretary of State, and which the proper court could enforce by mandamus.

So this court held in the case of *The United States* vs. *Kendall*, 12 Peters, 524, that the entry of credit by the Postmaster General on the books of the department in favor of a claimant of the amount of an award in favor of a contractor, by an officer designated by Congress.

On this the court says, "The act required by the law to be done by the Postmaster General is simply to credit the relators with the full amount of the award of the solicitor. This is a precise, definite act, purely ministerial, and about which the Postmaster General had no discretion whatever." p. 613. *United States* vs. *Seaman*, 17 How., 225. A governor of the State in such cases has been held amenable to the writ.

Pacific Railroad vs. *Governor*, 23 Miss., 353.
Colton vs. *Ellis*, 7 Jones Law, (N. C.,) 545.
Chamberlain vs. *Sibley*, 4 Minn., 309.
7 O. S. R., 372.
Ohio vs. *S. P. Chase*, 5 O. S. R., 529.

Other State officers are liable to the writ to compel performance of ministerial duties.

So the auditor of a State.
Divine vs. *Harris*, 8 Mon. (Ky.) 440.

So the comptroller of a State.
Fowler vs. *Pierce*, 2 Cal. Rep. 165.
Towle vs. *The State*, 3 Florida Rep., 202.
The People vs. *Lorenzo Burrows*, 27 Barb., 89.

Where a law made appropriations for a certain purpose and enacted that payments should be made on accounts certified by the Secretary of State, which certificates to be

sufficient vouchers for the auditor to draw his warrant on the Treasury. The certificate of the Secretary of State held conclusive on the auditor, left him no discretion, and the drawing and delivery of the warrant could be enforced by mandamus.

Danby vs. *Whitely*, 14 Ark. 687.
The State vs. *Hastings*, 10 Wis. Rep. 518.

The Court goes so far as to hold that although the decision of an auditor, as to the amount of a claim which the law permits him to settle is conclusive; yet his decison as to whether the claim is in its nature within the statute is not so, and is revisable on mandamus.

So where an auditor refuses to perform an act the law enjoins upon him, because he believes the statute unconstitutional and void, he may be compelled by mandamus.

Citizens Bank &c. vs. *Wright*, 6 O. S. Rep. 318.
So also in *The People* vs. *State Treasurer*, 4 Mich. 24.
Burnett vs. *The Auditor of Portage Co.*, 12 O Rep. 54.

The mandamus for a warrant or payment will be refused when the officer has not the right to fix the amount due, and such amount has not been ascertained by the proper authority.

The Commissioners vs. *Auditor*, 1 O. S. Rep. 322.
City of Zanesville vs. *Richards*, 5 O. S. Rep. 589.
Hamilton, Auditor, vs. *The State*, 3 Ind. Rep. 452.

That a mandamus will lie to compel a county treasurer to pay an account legally chargeable to the county, and which has been audited and allowed by the proper authority is fully settled.

The People vs. *Edmunds*, 19 Barb. 472.
See also *Carpenter* vs. *Bristol*, 21 Pick., 258.
Smith vs. *Mayor and Aldermen of Boston*, 1 Gray, 72.

To the same effect is the later case of *Harrington* vs. *The County Commissioners of Berkshire*, 22 Pick, 263.

To compel the Commissioners of a county to levy a tax to pay bonds issued by the county.

Knox County vs. *Aspinwall*, 24 How. 376.
Von Hoffman vs. *City of Quincy*, 4 Wall, 435.
City of Galena vs. *Arny*, 5 Wall, 705.
Riggs vs. *Johnson Co.*, 6 Wall, 166.
Bates vs. *City of Muscatine*, 8 Wall, 575.
Mayor vs. *Lord*, 9 Wall, 409.
The People vs. *Supervisors*, 4 Seld. N. Y. R., 318.
Commonwealth vs. *Commissioners*, 3 Pa. S. R. 237,277
The People vs. *Supervisors*, 35 Barb., 408.
Thomas vs. *Armstrong*, 7 Cal., 286.

These cases all show that in a case like the present the general, if not universal practice, in the Federal and State courts, has been to regard the writ of mandamus as the proper remedy in a matter like that at bar.

The Secretary of the Treasury, I presume, can claim no higher power, prerogative, privilege, or exemption by virtue of his office, than the Lords of the Treasury in England. Yet, as we shall show by cases directly on the point, the latter have been held amenable to this writ from the Court of Queen's Bench, in cases certainly not as strong as the one at bar. The first English case we shall cite, arose in this manner :

The Lords of the Treasury recommended a retired allowance to a public officer, and obtained a vote of Parliament for a particular sum, which was received from time to time under the appropriation act by the proper officer. In several letters written by their Secretary these facts were stated, and directions given as to the mode of obtaining payment. The Lords of the Treasury refused to pay it over to the individual to whom it was granted, unless upon conditions to which he would not agree. Held first, that he had a legal right to the amount so recommended. Secondly, that the court would enforce pay-

ment by mandamus, inasmuch as the claimant had no other remedy, and the writ was demanded not against the King but against officers into whose hands money had been paid under an act of Parliament for the use of an individual.

Rex vs. *Treasury*, (Lords,) 5 Neville & Manning, 589.

4 A. & E., 286.

1 Hurlstone & Walmesley, 533.

Again, William the Fourth, in pursuance of the 1 and 2, Will 4, C. 11, granted to trustees for his consort Queen Adelaide an annuity of £100,000, to commence on the decease of his Majesty, and continue during the natural life of her Majesty, payable out of the consolidated fund on the 13th of March, 30th of June, 30th of September and 31st of December, by even and equal portions, the first payment to be made at such of those days as shall first and next happen after the decease of his Majesty, in case her Majesty should survive him. His Majesty died on the 20th of June, 1837. On 30th of June, the trustees received a full quarter's payment. This payment was made after consulting the law officers of the Crown, who advised that the whole quarterly payment was then due; and her Majesty was informed of their advice. The quarterly payments were made up to and including 30th of September, 1849. Her Majesty died on 2d December, 1849. Her trustees applied for a proportionate part of the quarterly payment, which would have become due on 31st of December, 1849, if she had so longed lived. On a rule *nisi* for a mandamus to the Lords of the Treasury to issue a warrant for this payment. Held that if the annuity had been apportionable and the sum due, mandamus was the proper remedy; and that the court would not in exercise of its discretion, make the refunding of what on that supposition would have been over payment on 30th of June, 1837, a condition to the issuing of the

writ, there being no equity to require her Majesty's representatives to restore a sum received under the *bona fide* belief that it was her own.

The court will not grant a mandamus, calling upon the Lords Commissioners of the Treasury to pay a debt or claim, unless they have admitted that they have received money granted by Parliament for that specific purpose.

Ex parte Walmesley.
1 Best & Smith, 81.
7 Jur., N. S. 10 10.
9 Weekly Reporter, 599.
4 Law Times, (N. S.) 242.

The court will perceive that the act of September 24, 1789, sec. 13, gives this court authority to issue "writs of *mandamus*, in cases warranted by the principles and usages of law to any courts appointed or persons holding office under the authority of the United States." 1 Stat., 80.

We have, therefore, cited these cases from England and the States, to show that the mandamus we ask for in this case is warranted, sanctioned and sustained by the principles and usages of law. We cannot conceive, that in this nation, under our free Constitution, where the people only are sovereign, and the Constitution and laws alone supreme within their sphere, that the privileges, exemptions and immunities of public officers are greater and more extensive than are those of the officers and ministers of the soverign under a monarchy. These principles and usages of law were of course such principally as prevailed in England, and we had adopted from their system.

Has the Supreme Court of the United States Original Jurisdiction to Issue the Writ in this Case?

2d. By the act of September 24, 1789, sec. 13, 1st Stat., 80, the Supreme Court "shall have power to issue writs

of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction, *and writs of mandamus in cases warranted by the principles and usages of law*, to any courts appointed *or persons holding office* under the authority of the United States." And by the 14th section of the same act it is provided that all the courts of the United States, mentioned before, "shall have power to issue writs of *scire facias*, *habeas corpus*, *and all other writs* not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

These powers are greatly extended and enlarged by the acts of March 2, 1833, 4 Stat., 632, and August 29, 1842, 5 Stat., 539.

The original jurisdiction conferred upon the Supreme Court by the Constitution is in the following clause:

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction."

The judicial power of the United States "shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority," "to controversies between two or more States, between a State and citizens of another State, between citizens of different States," &c.

This court decided, in general terms, we admit, that the Supreme Court had not original jurisdiction of a mandamus to compel a public officer to perform a ministerial act. They also held, in general terms, that where the Constitution conferred original jurisdiction on the Supreme Court it was exclusive, and that original jurisdiction in the same cases could not be conferred upon any other courts by Congress. The court also held that Congress

had no power to extend and enlarge the grant of original jurisdiction given by the Constitution to this court.

Whether the original jurisdiction of the Supreme Court is exclusive in the cases named in the clause of the Constitution cited, is we believe still a mooted question. The first case contested on that ground was in the circuit court for Pennsylvania. It was there held by Judges Wilson and Peters, Judge Iredell dissenting, that this grant to the Supreme Court did not preclude Congress from vesting a concurrent jurisdiction in other courts over the same causes. This doctrine was shaken by the opinion in the case of *Marbury* vs. *Madison*, 1 Cranch, 137. It was not however a point in issue, or necessary to the determination of that case. The reasoning in the case is considerably shaken by that of the same great judge in the case of *Cohens* vs. *Virginia*, 6 Wheat., 264. In *The United States* vs. *Ortega*, it was treated by this court as an open question.

In the Wheeling Bridge case, 13 How., 518, the judges state that the suit might have been brought in the Circuit Court, although the State of Pennsylvania was the party plaintiff in the case. But as that aspect of the case is immaterial here, we need not pursue it.

If this court have original jurisdiction of the case, it is of course immaterial whether it be concurrent or exclusive.

Jurisdiction in this case results from the fact that a State is a party; and that it is a case at law, arising under the Constitution and laws of the United States. In the case of *Marbury* vs. *Madison* the jurisdiction of the court was attempted to be sustained in a case in which an individual, other than those enumerated in the Constitution, not an ambassador, minister or consul, sought to enforce his rights against a public officer by mandamus. It was this jurisdiction which for want of the proper parties designated in the Constitution, this court said Congress could not confer.

In other words, that it was not within the power of Congress to enlarge or extend the original jurisdiction of the Supreme Court of the United States, to any subject matter or parties beyond those expressly mentioned in the Constitution itself.

Whenever, therefore, a State is a party to a case at law or in equity, the suit may be brought in this court.

Rhode Island vs. *Massachusetts*, 12 Pet., 657.
Penna. vs. *The Wheeling Bridge Co* , 13 How., 518.
Kentucky vs. *Ohio*, 24 How., 66.
Kentucky vs. *Missouri*, 11 Wall., 395.
State of Georgia vs. *Grant*, 6 Wall., 241.
State of Georgia vs. *Stanton*, ibid., 50.
Mississippi vs. *Johnson*, 4 Wall., 475.

In *Kentucky* vs. *Ohio*, 24 How., 66, it was held that the writ of mandamus does not issue by virtue of any prerogative power. It is but an ordinary action at law, wherever it is the appropriate remedy. It is subject to the legal and equitable discretion of the court and ought not to be issued in cases of doubtful right.

Life & Fire Ins. Co. vs. *Wilson*, 8 Peters, 291.

It is no difference what is the nature or character of the controversy, if the court have jurisdiction of the parties.

In the case of *Kendall, Postmaster General of the United States* vs. *The United States*, on the relation of Stokes et al., 12 Peters, 524, it was established that the proper court had authority to issue a mandamus to a high officer of the United States, to compel the performance of a mere ministerial act in which the relator had an interest.

But the question of jurisdiction of this court, is we think finally and definitely settled by the cases of *Penna.* vs. *The Wheeling Bridge Co.*, 13 How., 518; and *Commonwealth of Kentucky* vs. *Dennison, Governor of Ohio*, 24 How., 66. In the latter case, on p. 97, the late distinguished chief justice, after citing the cases of *New*

Jersey vs. *New York*, 5 Peters, 284, and *Chisholm* vs. *The State of Georgia*, 2 Dall., 419 *et seq.*, quotes with approbation from the opinion of Chief Justice Marshall in the latter case, as follows:

'It has been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a State under the authority conferred by the Constitution and existing acts of Congress. The rule respecting the process, the persons on whom it is to be served, and the time of service are fixed. The course of the court on the failure of the State to appear after due service of process, has been also prescribed.' And proceeds further: 'And in same case, page 289, he states in full the proofs which had been established by the court as a rule of practice in the case of *Grayson* vs. *The State of Virginia*, 3 Dall., 320, and ever since followed. This rule directs, 'that when process at common law or in equity, shall issue against a State, the same shall be served upon the governor or chief executive magistrate, and the attorney general of such State.'

The chief justice proceeds: "It is equally well settled, that a mandamus, in modern practice, is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English Crown, and was subject to regulations and rules which have long since been disused. But the right to the writ, and the power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process, in cases to which it is applicable. It was so held by this court in the cases of *Kendall* vs. *The United States*, 12 Peters, 615; *Kendall* vs. *Stokes, et al.*, 3 How., 100."

These cases we think clearly establish our right to the mandamus, and the jurisdiction of and power of this court to issue it, we think we have shown.

1. That the act demanded of the Honorable Secretary of the Treasury, by the State of Kentucky, is a purely ministerial act. That its performance is commanded by positive law, and leaves no choice, option, discretion or judgment in that regard to the defendant.

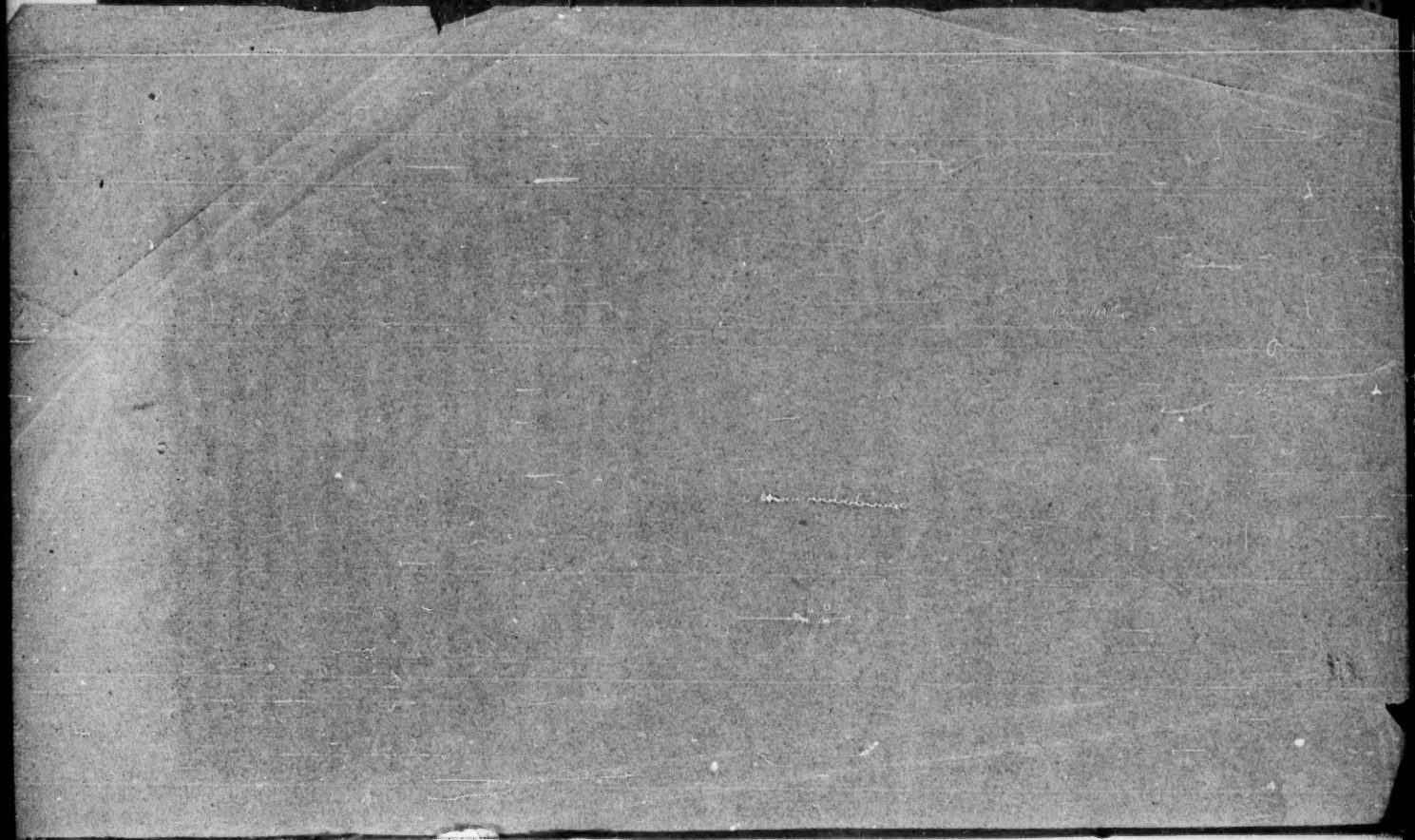
2. That the writ is necessary to the due and proper enforcement of the just pecuniary rights of the Commonwealth of Kentucky. That the case involves no question of political rights or sovereignty, but simply one of money or property. And that the State of Kentucky has no other appropriate, adequate or efficient remedy to enforce these rights.

3. That the State of Kentucky being in name and in fact and in interest a party to the suit, this court has original jurisdiction of the case.

4. That the defendant cannot by virtue of his office, claim exemption from the compelling power of the writ, where the right of the State is clear, and his duty plainly and only ministerial, without option or discretion in its performance.

5. We therefore respectfully ask the court that an alternative mandamus may issue, or a rule to show cause why a peremptory mandamus should not issue, in such manner as the court shall deem just and right in the premises.

GEORGE R. McKEE,
BARTLEY & CASEY,
Of Counsel for the
Commonwealth of Kentucky.



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Judge Clifford

In the Supreme Court of the United States.

ORIGINAL No. , DECEMBER TERM, 1871.

THE

COMMONWEALTH OF KENTUCKY

ON THE RELATION OF PRESTON H. LESLIE,
GOVERNOR OF SAID COMMONWEALTH,

VS.

GEORGE S. BOUTWELL,

A CITIZEN OF THE STATE OF MASSACHUSETTS, AND SECRETARY OF THE TREASURY OF THE UNITED STATES.

BRIEF FOR RELATOR,

ON RULE TO SHOW CAUSE, &C.

JOSEPH CASEY,
Of Counsel for Kentucky.

WASHINGTON:
PRINTED BY POWELL, GINCK & CO.
1871.

In the Supreme Court of the United States.

THE COMMONWEALTH OF KENTUCKY, *on the Relation of Preston H. Leslie, Governor of said Commonwealth, &c.* vs. GEORGE S. BOUTWELL, *Secretary of the Treasury.*	ORIGNAL No. Dec. Term, '71.

BRIEF FOR RELATOR ON RULE TO SHOW CAUSE, &C.

The State of Kentucky, before she can demand a peremptory mandamus in this case, must establish the following points:

1st. We must show that the State of Kentucky has a legal right to the thing demanded.

2d. That the law affords no other efficient and adequate remedy for the enforcement of that right.

3d. That the law commands the delivery of the warrant or the payment of the money by the defendant as a ministerial act, without the right of revision, option, or discretion.

4th. That Congress has made an appropriation for the payment of the claim, which is in the possession and under the control, actual or potential, of the defendant.

5th. That this court has original jurisdiction to entertain the suit, and enforce the right of the plaintiff, and compel the performance of the duty of the defendant by writ of mandamus.

I. Has the State of Kentucky a clear legal right to receive this money? On this subject we show the solemn

engagement of the United States by law of Congress, passed July 27, 1861, 12 Stat., 276, providing that the States shall be indemnified for the costs, charges and expenses, properly incurred by them in raising and supporting troops employed in aiding to suppress the rebellion.

That the troops, for which pay is demanded here, were raised by Kentucky, and the expenses properly incurred by her, is established by the decision of the President through the War Department. This determination was sanctioned and sustained, if it needed any other affirmance, by the accounting officers of the Government. Then the War Department decides, moreover, that the troops so raised, and for which these expenses were incurred, had been employed in aiding to suppress the insurrection against the United States. These were all facts in the military history and operations of the United States, which were peculiarly within the cognizance and knowledge of the War Department. And if they existed at all, were only known officially to and by the officers of the United States connected with and under the orders of that department; or were evidenced by letters, reports and other papers and documents contained in its archives. To ascertain and preserve these important facts and to determine upon them, in reference to these claims of these States, were high executive duties belonging eminently to the President, as the Chief Executive of the nation, as well as commander-in-chief of all its military forces.

In the performance of these duties—in the administration of these executive powers and functions—the President necessarily employs the Secretary of War and the department under his charge. The lawful acts of the Secretary and of the department, are the acts of the President, himself. They have all the legality, force and efficiency of his own proper acts. This is the plain purport of the act of Congress, August 7, 1789; 1 Stat., 49. Such were

the provisions too of the old law of 1785, before the adoption of the Constitution. See 1 Stat., 49, in note. This court held too, in Parker *vs.* The United States, 1 Peters, 293, that where a statute conferred a discretionary power to make additional allowances to military officers, that the Secretary of War as the legitimate organ of the President, in military affairs, may lawfully exercise such discretion.

But it would be a strange anomaly if the President should authorize, or the Constitution and laws permit, one Executive Department to revise and reverse the decisions of another—still stranger if that revising and reversing department, in military questions, should be the Treasury; one whose organization, machinery and faculties are totally unfitted to and without adaptation for such purpose.

A proper examination and determination of these questions, involve military knowledge, skill and experience, which the Secretary of the Treasury could hardly be presumed to have.

> "Who never set a squadron in the field,
> Nor the divisions of a battle knew
> More than a spinster."

On this military decision, the accounting officers settled the account. This Congress says, in the law of March 30, 1868, shall be final and conclusive upon the Executive Department of the Government, (see 15 Stat., 54), "subject to revision only by Congress or the proper courts;" and, of course, not subject to revision by the Secretary of the Treasury. If there can be any force in language, this act disposes of every pretence set up in this case.

But we go farther, and after the balance struck, we have that balance approved by the War Department in the requisition drawn for the warrant.

If this does not make a clear, indisputable, legal right, we are surely at a loss to comprehend the force of that term.

II. Is there any other Adequate and Efficient Remedy?

We think none has been and none can be pointed out.

The rule deducible from the authorities, we think, is, *where the law imposes a specific duty, either in positive terms or by reasonable construction, and there is no other specific or adequate remedy, the writ will be awarded.*

Rex vs. *Nottingham*, Waterworks, 6 Ad. & El., 355; 1 Q. B., 667; 3 Eng. R., C. 411.

Two things must concur to authorize the mandamus; 1st. There must be a specific legal right; 2d. The absence of an effectual legal remedy.

In this case we think these two requisites clearly concur. As apart from the mandamus we know of no direct remedy whatever. A suit at law against the Secretary would be no such remedy. A suit against the United States in the Court of Claims is no specific remedy, as the United States has not refused to pay. On the contrary, the legislative and proper executive authority of the United States have conceded our right to the money, and admit their obligation to pay. And have commanded the Secretary to obey, Our right is therefore clear, and his duty is plain, and it needs only the judicial power to enforce them.

Congress having, by the act of July 27, 1861, made an appropriation for reimbursing the States, and provided the special manner in which it shall be done, *i. e.*, "upon proper vouchers being passed upon by the accounting officer of the Treasury," the Secretary being directed to pay; there is no other remedy by which this particular appropriation can be reached. There is, therefore, no other adequate remedy open to the plaintiff. Besides, the

plaintiff has a right to insist upon the special remedy given by the act creating the right claimed. *Knox County* vs. *Aspinwall*, 24 Howard.

III. Is the matter here demanded a ministerial act such as can be enforced by mandamus?

If we are right in the first point above presented, an affirmative answer follows necessarily to this one. By the 1st section of act of September 2, 1789, 1 Stat., 65, the Secretary is "to grant, under the limitations herein established, or to be hereafter provided, all warrants for moneys to be issued from the Treasury in pursuance of appropriations by law." The Treasurer, by section 4 of same act, is to keep the public moneys, and "disburse the same upon warrants drawn by the Secretary of the Treasury, countersigned by the Comptroller, recorded by the Register." In the act of Congress upon which the proceedings are grounded, that of July 27, 1861, 12 Stat., 276, there is a direct command to pay this money. "The Secretary of the Treasury be, and he is hereby, directed, out of any money in the Treasury not otherwise appropriated, to pay to the governor of any State, &c., the costs, charges, and expenses incurred in enrolling, &c., to be settled upon proper vouchers, to be filed and passed upon by the proper accounting officers of the Treasury."

The act of March 30, 1868, 15 Stat., 54, says that the heads of departments shall not *change or modify* the balances that may be certified to them by the comptrollers, but that such balances "shall be taken and considered as final and conclusive upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts."

If this settlement be final and conclusive, then what duty has the Secretary to perform? If he cannot *change or modify* the balance, what remains for him to do but to issue the warrants, as directed by the act of 1789, and by

the act of July 27, 1861? All the requisites and conditions of the law have been complied with, and he is to *grant* the warrant, and pay to the governor of the State the amount found due.

These are specific duties commanded by law. They are not a part of the general political or executive duties and functions he performs under the authority of the President, and subject to his orders and discretion. But they are special and particular duties annexed and superadded by law of Congress to his Executive office and in the performance of which, neither he nor the President have any option or discretion.

These distinctions are stated with such clearness and force, in the opinion of Mr. Chief Justice Marshall, in Marbury vs. Madison, 1 Cranch, 137, as to exhaust the whole subject.

"The conclusion is that, where the heads of departments are the political or confidential agents of the executive, merely, to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. *But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.*"

Again in the same case he says:

"But when the legislature proceeds to impose on that officer, other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent upon the performance of those acts; he is, so far, the officer of the law, is amenable to the laws for his conduct, and cannot at his discretion sport away the vested rights of individuals."

Again he says:

"*It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined.* Where the head of an executive department acts in a case in which executive discretion is to be exercised, in which he is the mere organ of executive will, it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation. But where he is directed by law to do a certain act, affecting the absolute rights of individuals, *in the performance of which, he is not placed under the particular direction of the President. and the performance of which the President cannot lawfully forbid, and therefore is never presumed to have forbidden* * * * In such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department:"

In the *United States* vs. *Kendall*, 12 Peters, 524, this court held that a mandamus would lie to a cabinet officer, to compel the performance of a ministerial duty commanded by law, in which individuals had a vested right.

In that case the Postmaster General, as here, was backed by the opinion, influence and learning of the Attorney General, and in his answer—

1st. Denies the right of the judiciary to control the executive department, in any manner or any case whatever in the exercise of its functions.

2d. That the Circuit Court had no jurisdiction.

3d. That if the courts could issue a mandamus to an executive officer in any case, it could not be in the circumstances of that case.

4th. That the mandamus of the Circuit Court commanded an impossibility.

And after most full and exhaustive argument by eminent counsel on both sides the mandamus was sustained.

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In the *United States* vs. *Kendall*, 12 Peters, 524, this court held that a mandamus would lie to a cabinet officer, to compel the performance of a ministerial duty commanded by law, in which individuals had a vested right.

In that case the Postmaster General, as here, was backed by the opinion, influence and learning of the Attorney General, and in his answer—

1st. Denies the right of the judiciary to control the executive department, in any manner or any case whatever in the exercise of its functions.

2d. That the Circuit Court had no jurisdiction.

3d. That if the courts could issue a mandamus to an executive officer in any case, it could not be in the circumstances of that case.

4th. That the mandamus of the Circuit Court commanded an impossibility.

And after most full and exhaustive argument by eminent counsel on both sides the mandamus was sustained.

To the argument that the Postmaster General was alone subject to the direction and control of the President, in the performance or refusal to perform the duty enjoined by the law, the court says:

"*This is a doctrine that cannot receive the sanction of this court.* It would be vesting in the President a dispensing power which has no countenance for its support in any part of the Constitution, and is asserting a principle which if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress and paralyze the administration of justice."

Again the court says:

"The act required by the law to be done by the Postmaster General is simply to credit the relators with the full amount of the award of the solicitor. This is a precise, definite act, purely ministerial, and about which the Postmaster General had no discretion whatever." "This was not an official act in any other sense than being a transaction in the department where the books and accounts were kept, and was an official act in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act. There is no room for the exercise of any discretion, official or otherwise. All that is shut out by the direct and positive command of the law, and the act required to be done is in every just sense a mere ministerial act."

And as the court is well aware the judgment awarding a peremptory mandamus was affirmed by this court.

But the case which resembles that at bar, probably more exactly than any other reported case, is that of *The King* vs. *The Treasury*, (Lords,) 5 Nev. & Man., 589; also reported 4 Ad. & El., 286, and 7 Hur. & Walm., 533. In that case a peremptory mandamus was issued to compel the payment of a retired allowance to an officer, included in the estimates, and the money appropriated by Parliament. In giving judgment, Lord C. J. Denman said:

"I cannot assent to the argument that the court cannot

issue a mandamus to the Lords of the Treasury, *because they are officers of the crown.* The crown has nothing more to do with these than with any other public officers. They have received money as trustees for an individual, and then avoid paying it by annexing an illegal condition to the receipt of this money by that individual. I think we may issue the mandamus to the Lords Commissioners of the Treasury." And the writ was issued.

The right to issue the writ to these Lords Commissioners was reasserted in *Regina* vs. *Treasury Lords*, 16 Queen's Bench, 357.

Sir Thomas Wroth's case, Plow., 452, was a petition of right to be paid an annuity out of the king's revenues, specially designated and pledged by King Henry VIII to his son Prince Edward, and to be paid to plaintiff as the usher of the Prince.

See also *Williamson* vs. *Regem*, 14 Howell St. Trials, 1 to 111. This case was decided in the Exchequer for plaintiff, reversed by the Exchequer Chamber, and the first judgment affirmed by the House of Lords.

In *Rankin* vs. *Huskinson*, 4 Simons, 13, an injunction was granted out of chancery against the Commissioners of Woods and Forests restraining them from building on part of the site of Carlton Palace in violation of the agreement entered into by them with the plaintiff.

Ellis vs. *Earl Grey*, 6 Simons, 214. An injunction was granted to restrain the Lords of the Treasury from paying the compensation awarded under 11 Geo., 4, c. 58, for the office of side clerk in the Exchequer, which had been abolished. In that case, as here, the Lords of the Treasury denied the jurisdiction of the court, and demurred to the bill. But the court gave judgment for the plaintiff.

The vice-chancellor said:

"The compensation money is to be paid out of the consolidated fund, and it is to pass through the hands of the Lords of the Treasury, *who are to be mere ministerial con-*

duit pipes for payment of it to the parties entitled. The Lords of the Treasury are therefore not at all in a different situation from the Governor and Company of the Bank of England, who are frequently prevented by this court from transferring stock or paying dividends to the individuals who appear on their books to be entitled to them.

"This court has interfered with other public officers, as, for instance, the Commissioners of the Woods and Forests in the case alluded to, (4 Simons, 13,) and the commissioners under the conventions with France for indemnifying British subjects for the confiscation of their property by the French revolutionary government."

"I am of opinion this bill does not seek to interfere with any public duty the Lords of the Treasury have to discharge, or with any discretion they have to exercise in their public capacity. But it seeks to restrain them from doing a mere ministerial act with a view to secure the money for the parties who may be decreed to be entitled to it."

Demurrer overruled.

A governor of the State in such cases has been held amenable to the writ of mandamus.

Pacific Railroad vs. *Governor*, 23 Miss., 353.
Colton vs. *Ellis*, 7 Jones Law, (N. C.,) 545.
Chamberlain vs. *Sibley*, 4 Minn., 309.
7 O. S. R., 372.
Ohio vs. *S P. Chase*, 5 O. S. R., 529.

So the auditor of a State.

Divine vs. *Harris*, 8 Mon. (Ky.) 440.

So the comptroller of a State.

Fowler vs. *Pierce*, 2 Cal. Rep.. 165.
Towle vs. *The State*, 3 Florida Rep., 202.
The People vs. *Lorenzo Burrows*, 27 Barb.. 89.

Where a law made appropriations for a certain purpose and enacted that payments should be made on accounts certified by the Secretary of State, which certificates to be sufficient vouchers for the auditor to draw his warrant on

the Treasury. The certificate of the Secretary of State held conclusive on the auditor, left him no discretion, and the drawing and delivery of the warrant could be enforced by mandamus.

Danby vs. *Whitely*, 14 Ark., 687.
The State vs. *Hastings*, 10 Wis. Rep., 518.

The court goes so far as to hold that although the decision of an auditor, as to the amount of a claim which the law permits him to settle is conclusive; yet his decision as to whether the claim is in its nature within the statute is not so, and is revisable on mandamus.

So where an auditor refuses to perform an act the law enjoins upon him, because he believes the statute unconstitutional and void, he may be compelled by mandamus.

Citizen's Bank, &c., vs. *Wright*, 6 O. S. Rep., 318.
So also in *The People* vs. *State Treasurer*, 4 Mich., 24.
Burnett vs. *The Auditor of Portage Co.*, 12 O. Rep., 54.

The mandamus for a warrant or payment will be refused when the officer has not the right to fix the amount due, and such amount has not been ascertained by the proper authority.

The Commissioners vs. *Auditor*, 1 O. S. Rep., 322.
City of Zanesville vs. *Richards*, 5 O. S. Rep., 589.
Hamilton, Auditor, vs. *The State*, 3 Ind. Rep., 452.

That a mandamus will lie to compel a county treasurer to pay an account legally chargeable to the county, and which has been audited and allowed by the proper authority is fully settled.

The People vs. *Edmunds*, 19 Barb., 472.
See also *Carpenter* vs. *Bristol*, 21 Pick., 258.
Smith vs. *Mayor and Aldermen of Boston*, 1 Gray, 72.

To the same effect is the later case of *Harrington* vs.

The County Commissioners of Berkshire, 22 Pick., 263.

To compel the Commissioners of a county to levy a tax to pay bonds issued by the county.

Knox County vs. *Aspinwall*, 24 How., 376.
Von Hoffman vs. *City of Quincy*, 4 Wall., 435.
City of Galena vs. *Arny*, 5 Wall., 705.
Riggs vs. *Johnson Co.*, 6 Wall., 166.
Bates vs. *City of Muscatine*, 8 Wall., 575.
Mayor vs. *Lord*, 9 Wall., 409.
The People vs. *Supervisors*, 4 Seld. N. Y. R , 318.
Commonwealth vs. *Commissioners*, 3 Pa. S. R., 237, 277.
The People vs. *Supervisors*, 35 Barb., 408.
Thomas vs. *Armstrong*, 7 Cal., 286.

IV. That Congress has made an appropriation for the payment of the claim, if payable, is very clear. This was made in the act of July 27, 1871, and was a general standing appropriation. There being one hundred millions or more of money in the Treasury not otherwise appropriated, this point may be passed over without further remark.

V. The only remaining question is, has the court original jurisdiction?

The judicial power extends "to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority, &c., to controversies between two or more States, between a State and citizens of another State, between citizens of different States, * * * between a State or the citizens thereof, and foreign States, citizens or subjects."

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction.

"In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

The 11th amendment limits this grant of judicial power, and provides that it shall not "extend to any suit in law or equity, commenced or prosecuted, against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

The 13th section of the judiciary act provides, "that the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, and except also between a State and citizens of other States or aliens, in which latter case, it shall have original, but not exclusive, jurisdiction."

"The Supreme Court shall also have appellate jurisdiction from the Circuit Courts and courts of the several States, in the cases hereinafter specially provided for, and shall have power to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts apppointed, or persons holding office, under the authority of the United States."

Section 14 Provides "that all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias, habeas corpus, and all other writs not specially provided for by statute*, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

The original jurisdiction of this court, in the case at bar, results under these clauses in the Constitution, and these enactments of Congress.

1st. From the nture of the controversy.

2d. From the fact that a State is a party.

It is undoubtedly a case arising under the Constitution and laws of the United States. It is also a controversy between a State and a citizen of another State. These circumstances bring it clearly within the definition and grant of judicial power, as conferred on the United States by the 2d Sec. of the 3d Art. of the Constitution.

A State is a party, and therefore original jurisdiction to administer this judicial power, is conferred upon this court.

It does appear to us, that this grant is so direct and explicit, so unambiguous in its language, and so fully comprehends the very case in hand, in its terms and intent, that no amount of argument or illustration could make it plainer.

Such was the view too of this court in the cases of Chisholm *vs.* Georgia, in 1793. After full and elaborate argument, and mature consideration, it was held that the original jurisdiction conferred by the section quoted, and by the judiciary act, embraced all cases where a State was a party, whatever the controversy, if that controversy was judicial. And this, whether the State was plaintiff or defendant. Says Mr. Chief Justice Jay: "It cannot be pretended that where citizens urge and insist upon demands against a State, which the State refuses to admit and comply with, that there is no controversy between them. If it is a controversy between them, then it clearly falls, not only within the spirit, but the very words of the Constitution. What is it to the cause of justice, and how can it affect the definition of the words *controversy*, whether the demands which caused the dispute, are made by a State against citizens of another State, or by the latter against the former?"

"When power is thus extended to a *controversy*, it necessarily, as to all judicial purposes, is also extended to

those between whom it subsists."

"We find the same general and comprehensive manner of expressing the same ideas in a subsequent clause, in which the Constitution ordains that 'in all cases affecting ambassadors, other public ministers and consuls, *and those in which a State shall be a party*, the Supreme Court shall have original jurisdiction.' Did it mean here party plaintiff? If that only was meant, it would have been easy to have found words to express it. Words are to be understood in their ordinary and common acceptance, and the word party, being in common usage, applicable both to plaintiff and defendant, we cannot limit it to one of them in the present case. We find the legislature of the United States expressing themselves in the like general and comprehensive manner; they speak in the 13th section of the judiciary act of controversies where a State is a party, and as they do not impliedly or expressly apply that term, to either of the litigants, in particular, we are to understand them as speaking of both."

Huger vs. *The State of South Carolina*, 3 Dall. 320.

Oswald vs. *The State of New York*, 2 Dall., 415–402.

Cutting, Adm'r, vs. *South Carolina*, id.

The State of Georgia vs. *Brailsford*, 2 Dall., 402.

Hollingsworth vs. *Virginia*, 3 Dall., 378.

In the latter case at February term, 1798, on motion, after argument, it was held by this court, that the eleventh amendment prevented suits by individuals against States, and that it extended to all pending cases. And such suits were therefore dismissed.

Subsequent to this the jurisdicton of the court was frequently invoked in cases between two States.

The State of New Jersey vs. *The State of New York*, 5 Peters, 284.

Cherokees vs. *Georgia*, 5 Peters, 1.

The State of Rhode Island vs. *The State of Massachusetts*, 12 Peters, 657.

Kentucky vs. *Ohio*, 24 How., 66.

Kentucky vs. *Missouri*. 11 Wall., 475.

Florida vs. *The State of Georgia*, 17 How., 478.

The case of *Penn.* vs. *The Wheeling Bridge Co.*, 13 How., 518, is a full and clear authority that a State may invoke the original jurisdictlon of this court, in a case in which its right of property, or pecuniary interest were directly involved.

Kentucky vs. *Denison*, Governor of Ohio, 24 Howard, 66, furnishes besides the case at bar the only other instance in which the original jurisdiction of this court has been invoked, to issue a mandamus in favor of a State. The jurisdiction to entertain the suit was not denied, but it was held the court did not possess the legal power and authority to coerce a State officer.

Mr. Chief Justice Taney, in delivering the unanimous judgment of the court, in that case, after referring to several of the cases already cited in this brief, says: "The cases referred to leave no question open to controversy, as to the jurisdiction of the court." And further that the writ of mandamus does not issue from or by any prerogative power, and is nothing more than the ordinary process of a court of justice, to which every one is entitled, where it is the appropriate process for asserting the right he claims. We may therefore dismiss the question of jurisdiction without further comment, as it is very clear, that if the right claimed by Kentucky can be enforced by judicial process, the proceedings by mandamus is the only mode in which the object can be accomplished."

The State of Mississippi vs. *Johnson*, 4 Wall., 475, and so in the recent case of *The State of Georgia* vs. *Stanton*, 6 Wall, 50. In delivering the opinion of the court in the latter case, Mr. Justice Nelson says:

"By the second section of the third article of the Constitution, the 'judicial power extends to all cases in law and equity arising under the Constitution, the laws of the United States,' &c., and as applicable to the case in hand "to

controversies between a State and citizens of another State,' *which controversies, under the judiciary act, may be brought in the first instance before this court, in the exercise of its original jurisdiction*, and we agree, that the bill filed, presents a case, which it it be the subject of judicial cognizance would in form, come under a familiar head of equity jurisdiction, that is, jurisdiction to grant an injunction to restrain a party from a wrong or injury to the rights of another, where the danger, actual or threatened, is irreparable or the remedy at law inadequate."

The injunction in that case was denied only because the danger threatened was *not to the rights of persons or property*, but merely the political rights and sovereignty pertaining to a State. This marks the distinction between this case here quoted and that of *Pennsylvania* vs. *The Wheeling Bridge Co.*, and also the case at bar. The same doctrine had been fully maintained by this court in *The Cherokee Nation* vs. *The State of Georgia*, 5 Peters, 1.

In the great case of *Cohens* vs. *Virginia*, 6 Wheat., 264, the appellate jurisdiction of this court, in a case arising under the laws of the United States, was most vehemently denied and assailed. Mr. Chief Justice Marshall, in that case, referring to the clause of the Constitution conferring jurisdiction on the courts of the Union, says:

"From this general grant of jurisdiction no exception is made of those cases in which a State may be a party. When we consider the situation of the Government of the Union and of a State, in relation to each other; the nature of our Constitution; the subordination of the State governments to that Constitution; the great purpose for which jurisdiction over all cases arising under the Constitution and laws of the United States, is confided to the judicial department; are we at liberty to insert in this general grant, an exception of those cases in which a State may be a party? Will the spirit of the Constitution justify this attempt to control its words: we think it will not; we think a case arising under the Constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to the case."

Again he says:

"One of the express objects, then, for which the judicial department was established, is the decision of controversies between States, and between a State and individuals. *The mere circumstance that a State is a party, gives jurisdiction to the court.* How then can it be contended that the very same instrument in the very same section should be so construed as that this same circumstance should withdraw a case from the jurisdiction of the court, where the Constitution and laws of the United States are supposed to be violated."

The extent of this judicial power and jurisdiction is referred to by him in this language:

"One of the arguments pressed with great force by the counsel for the plaintiff in error (Ogden & Pinkney) is that the judicial power of every well-constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the Constitution and laws. *If any proposition may be considered a political axiom, this, we think, may be so considered.*"

In the following paragraphs the same great judge disposes of and sums up the whole case:

"The Constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others. Among those in which jurisdiction must be exercised in the appellate form are cases arising under the Constitution and laws of the United States. These provisions of the Constitution are equally obligatory, and are to be equally respected. If a State be a party, the jurisdiction of this court is original; if the case arise under the Constitution or a law, the jurisdiction is appellate. *But a case to which a State is a party may arise under the Constitution or a law of the United States.* What rule is applicable to such a case? What then becomes of the duty of the court? *Certainly, we think, so to construe the Constitution as to give effect to both provisions*, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument."

"In one description of cases the jurisdiction of the court is founded entirely on the character of the parties, and the nature of the controversy is not contemplated by the Constitution. The character of the parties is every thing—the nature of the case nothing. In the other description of cases, the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the Constitution. In these the nature of the case is everything—the character of the parties nothing. Then the Constitution declares the jurisdiction, in cases where a State shall be a party, to be original, and in all cases arising under the Constitution or a law to be appellate. *The conclusion seems irresistible, that its framers designed to include in the first class those cases in which jurisdiction is given, because a State is a party*, and to include in the second those in which jurisdiction is given, because the case arises under the Constitution or a law."

Why, then, the State of Kentucky being the only party plaintiff, and being directly and pecuniarily interested in the case, has not this court original jurisdiction? Is it because it is a case arising under the Constitution and laws of the United States, and is only subject to the appellate and not the original jurisdiction of this court? This position is disposed of by the clear and lucid exposition of this court in the case cited. If the case had been brought in an inferior court, the appellate jurisdiction of this court would have attached, *because it is a case at law arising under the Constitution or a law of the United States.* The character of the controversy would have given appellate jurisdiction. A State of the Union being plaintiff, gives this court full, clear, and unmistakable original jurisdiction, and that too irrespective of the nature and character of the controversy itself.

In the cases of *Marbury* vs. *Madison*, *United States* vs. *Kendall*, and *Kentucky* vs. *Dennison, Governor of Ohio*, and other cases, it has been solemnly adjudged by this court that the proper courts of the United States may, in the exercise of their judicial functions, compel a cabinet

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minister, or other high officer of the United States, to perform a mere ministerial duty, enjoined by law, by writ of mandamus. This can no longer be considered an open question. I admit that this jurisdiction will only be exercised in very special cases to prevent a failure of justice. Yet that does not impair the right, or affect the jurisdiction in a case clearly calling for its exercise.

Why may not this court award the writ in a case in which it has original jurisdiction of the parties? Does the Constitution either impliedly or expressly forbid it from so doing? Is there anything in the person of the defendant, or the office he holds, to exempt him from the power or process of the court?

So far from there being any prohibition against this court awarding such a writ to such an officer, the act of 1789 expressly authorizes it to be done. The act, in Marbury *vs.* Madison, it is true, so far as it attempted to extend the original jurisdiction of the Supreme Court, beyond the words of the Constitution, was declared invalid. But this does not invalidate the law, nor impair the power to issue the writs in a case, in which the Constitution clearly confers original jurisdiction upon this court.

The right and power of this court to issue a mandamus to a United States officer, in a case where a State is a party, we take it, would be complete without such an act. That there is such an act, and that the enactment is broader than the Constitutional provision, does not, in any manner, impair the right, nor is the act void, so far as it allows and provides, for such a writ, in cases in which this court may exercise original jurisdiction.

So far as this court is concerned, the Constitution confers all the original jurisdiction it can exercise—but within that jurisdiction, Congress may regulate the mode and manner of procedure. Thus it is not very clear, in our view, that Congress intended, by conferring this power

upon the Supreme Court, to issue "writs of *mandamus* in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States"; that they proposed to extend its original jurisdiction. Or that the Congress intended that this power should be invoked, and put into action, in any other cases than those in which this court had original jurisdiction under the Constitution. That a *mandamus* may issue from this court, in cases "affecting ambassadors, other public ministers and consuls and those in which a State shall be a party," appears to us incontrovertable; otherwise, we should have the strange spectacle and anomaly presented of the highest court in the nation, having exclusive jurisdiction in certain cases, but so circumscribed in its powers and faculties, as to be unable to afford the full and adequate relief to which the party was entitled in the case.

If the party could or should have brought his case in an inferior court, it is admitted, he could have had this writ, and the relief it affords. In such case, if the duty he required to be performed, was enjoined by an act of Congress, this court might eventually have to pass upon his right, in an appeal or writ of error. But being so unfortunate as to have *only* the right to resort originally to this high tribunal, he finds it so weak in its faculties, so barren in its powers, so circumscribed in its remedial agencies, as to be utterly unable to afford him the necessary and adequate relief his case and justice demand. This is "a most lame and impotent conclusion." And is, moreover, a view which this court, we think, can never sanction.

Very soon after the adoption of the Constitution, numerous cases were brought in this court against various States by individuals. It was contended that these suits could not be sustained, inasmuch as Congress had not

provided any mode of proceeding, or designated how the jurisdiction conferred, should be exercised. But this court held that the grant in the Constitution was, in itself, sufficient; and in the absence of legislation, authorized the court to exercise its powers, in the manner, and upon the principles and usages of law, as practised in that nation, after whose, our system of jurisprudence was modelled.

The act of Congress of July 14, 1862, made the bridge across the Ohio river at Steubenville, and the bridges over the same stream at various points, national highways and post routes, but directed and commanded that such bridges should be constructed by the various corporations, owning them with a span over the main channel of not less than three hundred feet wide, and with an elevation of not less than ninety feet above low water; and that the piers should be set parallel with the current of the river.

Suppose that the companies constructing these bridges, or any one them, should have disobeyed these injunctions and directions of the law, would not mandamus be the proper remedy to enforce the duty? Is it not the only adequate, direct and specific remedy the law could afford in such case? The case of *Penna.* vs. *The Wheeling Bridge Co.* shows that the State of Pennsylvania had a direct pecuniary and property interest in this question. She had a clear legal right to demand that the law should be complied with. The failure to do so, worked a direct damage and detriment to her rights and her property. Being a State so circumstanced, and so injured by these citizens of Ohio and Virginia, she had a right to apply for redress to this court. This court, as the former case shows, had most clearly jurisdiction. But notwithstanding, it is said this court cannot afford the only remedy that would be at all adequate and effectual in the premises.

If this be so, there ought to be some clear, satisfactory reason for it. Those who allege and set up such a restriction, limitation and curtailment of the powers of this court, ought to be able to point out some clear, definite provision in the Constitution to support the argument. There ought, if they are correct, be some plain reason why a writ known and used in almost all other courts, should be unauthorized here. Why this court alone should be debarred from enforcing in a case of which it has jurisdiction, a simple, direct and plain legal duty, in favor of a suitor that has a plain legal right.

Again, under the act granting the public swamp and overflowed lands to the various States in which they lie, the Secretary of the Interior is directed to make out an accurate list of such lands, and transmit the same to the governor of the State; and at the request of the governor cause a patent to be issued therefor. Suppose in such a case the survey to be made, the list transmitted, a patent demanded by the governor, the patent made out, signed by the President, and recorded, and then the Secretary of the Interior refuses to deliver it to the State to whom it belongs, is there no remedy for such a refusal as this? And if this court has no authority to issue a *mandamus* to a public officer, there certainly is none in this court. And if the original jurisdiction conferred by the Constitution on this court, in such a case where a State is a party, is exclusive, then there can be none anywhere. It results that no other court can entertain the cause. This one has no power to administer the only remedy the law affords. Wrong is triumphant and injustice prevails.

I cannot conceive that this court will, upon mere abstract reasoning and theory, fritter away the plain words of the Constitution, in order to curtail and dwarf their own powers and jurisdiction, but trust they will adhere to

what Mr. Chief Justice Marshall lays down as an axiom, "that the *judicial power* of every well constituted government must be co-extensive with the *legislative*, and must be capable of deciding every judicial question which grows out of the Constitution and laws." If the positions assumed against this jurisdiction in this case be well founded, then, under the increasing light of modern civilization and the progressive modern ideas in goverment and jurisprudence, the axiom announced by the great Chief Justice was a rank political heresy and solecism.

We think we have shown—

1st. That we have a clear legal right to be paid the money demanded.

2d. That it is by law made the duty of the defendant to pay it, without any option or discretion in the case.

3d. That there is an ample appropriation made by Congress to pay us, of which the defendant is the mere custodian and trustee for us.

4th. That mandamus is the only adequate and effectual, and therefore the only appropriate remedy to enforce this right.

5th. That a State being a party, in fact and interest, this court has full and complete jurisdiction, to enforce by *mandamus*, the legal right of the plaintiff, by compelling the performance of the legal duty of the defendant.

JOSEPH CASEY,
Of Counsel for Kentucky.

Supreme Court of the United States.

DECEMBER TERM, 1870.

O. D., No. .

EX PARTE, IN THE MATTER OF

THE COMMONWEALTH OF KENTUCKY,

Ex rel., PRESTON H. LESLIE, *Governor*,

vs.

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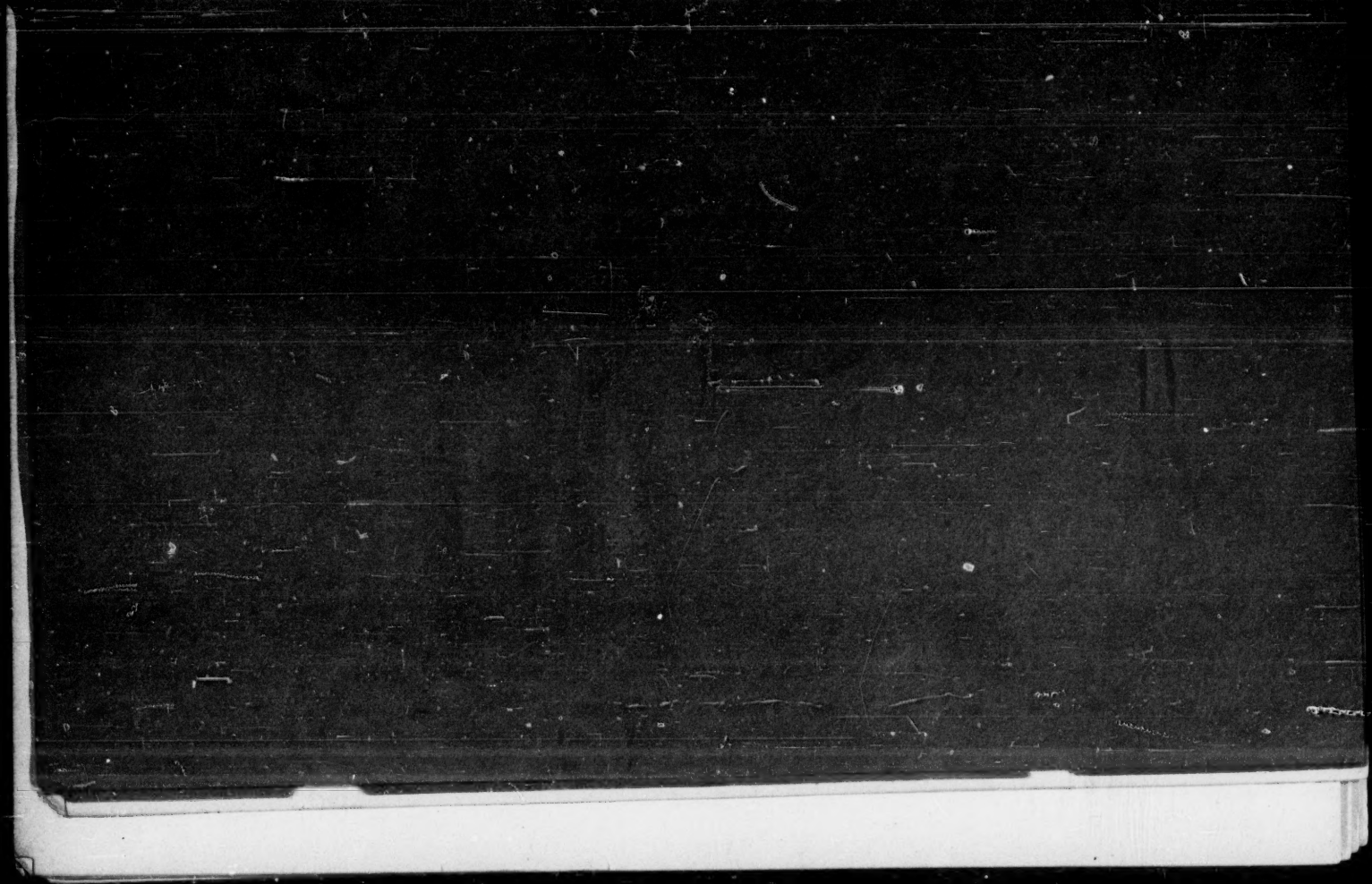

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I.

The second section of the third article of the Constitution provides that the judicial power of the United States shall "extend to controversies between a State and citizens of another State." The next succeeding clause of that section provides that, "in all cases affecting ambassadors, other public ministers, and consuls, *and those in which a State shall be a party*, the Supreme Court shall have original jurisdiction; in all the other cases before mentioned the Supreme Court shall have appellate jurisdiction."

This latter clause does not confer jurisdiction, it only distributes that granted in the preceding clause of the section, and

the thirteenth section of the judiciary act follows this distribution.

Pennsylvania *vs.* Quicksilver Co., 10 Wall., 555.

It is not then true, as assumed by the learned counsel for the State of Kentucky, that this court has original jurisdiction of all cases *in which a State is a party*. Such jurisdiction extends only "to controversies between a State and citizens of another State."

The present petition does not present such a case. The complaint is against *George S. Boutwell, Secretary of the Treasury*, and the ground upon which relief is sought is that he, in his *official* capacity, "at his office in the Treasury Department," failed to perform an alleged official duty, to-wit, to deliver a warrant to the Governor of Kentucky or his authorized agent; which supposed duty is expressly alleged to be imposed upon him, as Secretary of the Treasury, by law. The prayer of the petition is, that he be directed to "deliver the warrant aforesaid, *or a warrant upon the Treasurer of the United States*, for the said sum of five hundred and twenty-five thousand, two hundred and fifty-eight dollars and seventy-two cents, *due and owing by the said United States* to the said *State of Kentucky*."

This can only be done by the Secretary of the Treasury in his official capacity; and the fact that Mr. Boutwell, the present incumbent of that office, happens to be a citizen of Massachusetts has nothing whatever to do with the act which it is asked that he be compelled to perform. As an individual he cannot do it; his power in the premises is not the power of Mr. Boutwell, a citizen of Massachusetts, but of the Secretary of the Treasury. The demand is upon him entirely in his official character as an officer of the United States, and, therefore, is a demand against the United States.

The Governor of Georgia *vs.* Madrazo, 1 Pet., 123.
Kentucky *vs.* Governor of Ohio, 24 How., 66.

As an officer of the United States the Secretary of the Treasury has no citizenship in any State. His official residence is here, in the city of Washington. If Mr. Boutwell should resign or be removed would he, as a citizen of Massachusetts, be any longer a party to this controversy? Would he then have authority to do what is now demanded of him? Clearly not. Not even the mandate of this high court could then compel him to do it. Although he would still be a citizen of Massachusetts, and the supposed delinquency would still exist, there would remain no controversy between Kentucky and Mr. Boutwell. Upon the resignation or removal of the present Secretary the suit would abate.

The Secretary *vs.* McGarrahan, 9 Wall., 313.

And if his successor should happen to be a citizen of Kentucky, or of the District of Columbia, or of one of the Territories, the jurisdiction of this court would be ousted. It is manifest that this is not a suit against Mr. Boutwell as an individual, as a natural person, for any act that he has done as George S. Boutwell, but altogether in his official capacity as Secretary of the Treasury.

This court can have no original jurisdiction of such case.

Mandamus is not now to be regarded as a prerogative writ, but as an ordinary action at law between the parties.

Kentucky *vs.* Governor of Ohio, 24 How., 97.

Congress cannot authorize this court to issue the writ against a public officer as a matter of original jurisdiction.

Marbury *vs.* Madison, 1 Cranch, 137.

The original jurisdiction of this court, under the Constitution, must depend entirely upon the character of the parties, not upon the nature of the controversy or the questions involved.

This is, in fact, a suit by a State against a Federal officer. Or, if we apply the doctrine of the Governor of Georgia *vs.* Madrazo and Kentucky *vs.* The Governor of Ohio, *ubi supra*, to it, it is a suit by a State against the United States. Of such a suit the court has not original jurisdiction. The peculiar jurisdiction of the local court in this District, as administering the common law, enables it to control to some extent the action of Federal officers by mandamus; but it may be questioned whether that law can be called in to aid the original jurisdiction of this court, which depends solely upon the Constitution.

II.

The petitioners seek to compel the Secretary of the Treasury to deliver a warrant upon the Treasury of the United States for the amount alleged to be due from the United States to the Commonwealth of Kentucky under the act of July 27, 1861, (12 Statutes at Large, 276,) which enacts: "That the Secretary of the Treasury be, and he is hereby, directed, out of any money in the Treasury, not otherwise appropriated, to pay to the Governor of any State, or to his duly authorized agents, the costs, charges, and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops employed in aiding to suppress the present insurrection against the United States, to be settled upon proper vouchers to be filed and passed upon by the proper accounting officers of the Treasury."

Among the duties imposed upon the Secretary of the Treasury by the act of September 2, 1789, establishing the Treasury Department, section 2, (1 Statutes at Large, 65,) are "to decide on the forms of keeping and stating accounts and making returns, and to grant under the limitations herein established, or to be hereafter provided, all warrants for monies to be issued from the Treasury, in pursuance of appropriations by law *

* * * and generally to perform all such services relative to the finances as he shall be directed to perform."

It is apparent, therefore, that the duty now sought to be enforced by mandamus upon the Secretary of the Treasury, is one of those great duties connected with the revenue of the country for the performance of which his office was established, and which cannot be performed by any one else; and the question is whether the court can by means of mandamus control him in the performance of that duty?

This court has had occasion so frequently to pass upon the nature and use of the writ of mandamus, as applying to executive officers, that it will hardly be necessary to go, in this discussion, beyond the cases found in its own reports.

In Marbury *vs.* Madison, 1 Cranch, 137, 167 *et seq.*, the court held that the duty imposed upon the Secretary of State, of delivering the commission of an officer not removable by the President, whose nomination had been confirmed by the Senate, and he appointed, and the commission signed by the President and sealed by the Secretary, was a purely ministerial duty which he could have been compelled by mandamus to perform if this court had had jurisdiction to issue the writ to him, but the court held that it had not.

The first case in which a writ of mandamus was issued from a United States court to an executive officer, and the only case in which the writ has issued to one of the cabinet ministers, is Kendall *vs.* The United States, 12 Pet., 424. Congress had, by the act of July 2, 1836, (6 Stats. at Large, 665,) entitled "An act for the relief of William B. Stokes," and others, enacted, "That the Solicitor of the Treasury be, and he is hereby, authorized and directed to settle and adjust the claims of William B. Stokes" and other persons therein named, "for extra services performed by them as contractors for carrying the mail, * * * * * * and that the Postmaster General be, and he is hereby, directed to credit such mail contractors with whatever sum or sums of money, if any, the said solicitor shall

so decide to be due to them for and on account of any such service or contract." The court seems to have been unanimously of opinion that the duty thus imposed upon the Postmaster General was a purely ministerial and not an executive one, and could be enforced by mandamus, if the United States courts had authority to issue the writ; and a majority of the court held that the circuit court of the District of Columbia, by virtue of the common law in force in the District, had authority to issue the writ, although the other circuit courts of the United States had not jurisdiction of such a case, as had been decided in McIntire *vs.* Wood, 7 Cranch, 504.

In Decatur *vs.* Paulding, 14 Pet., 497, where the writ was sought to compel the Secretary of the Navy to pay a pension for five years from the navy pension fund to the widow of Commodore Decatur, in accordance with the act of March 3, 1837, (5 Stats. at Large, 180,) the terms of which are very peremptory, a majority of the Court held that the duty required by the statute was an executive act, involving the exercise of judgment, and not merely ministerial, and it consequently was a duty which could not be enforced by mandamus. The judges so holding refused to consider the question as to whether the Secretary of the Navy had construed the act of Congress rightly or not. (See the language of Chief Justice Taney, on pages 515, 516.) Justices Story, McLean, and Baldwin concurred in the decision, on the ground that the Secretary of the Navy had construed the statute correctly, but were of opinion that if he had not done so, the writ of mandamus was a proper remedy. In commenting upon this case in Brashear *vs.* Mason, 6 How., 92, 101, Mr. Justice Nelson said: "There was no question as to the amount due, if the plaintiff was properly entitled to the pension; and it was made to appear, in that case, affirmatively, on the application, that the pension fund was ample to satisfy the claim. The fund, also, was under the control of the Secretary, and the moneys payable on his own warrant. Still, the Court refused to inquire into the merits of the claim of Mrs.

Decatur to the pension, or to determine whether it was rightfully withheld or not by the Secretary, on the ground that the court below had no jurisdiction over the case."

These are the two leading decisions on this subject, and, although in neither of them was the Court unanimous, their authority has been recognized in every succeeding case, and the principles established by them are no longer open to controversy.

In United States *vs.* Seaman, 17 How., 225, 230, Chief Justice Taney, after citing the cases above referred to, says: "The rule to be gathered from all of these cases is too well settled to need further discussion. The writ cannot issue in a case where discretion and judgment are to be exercised by the officer; and it can be granted only where the act required to be done is merely ministerial, and the relator without any other adequate remedy." And again, on page 231, in commenting upon Kendall *vs.* The United States, the Chief Justice added: "All that the Postmaster General was required to do was, to enter the credit in the books of the Department when reported to him by the Solicitor of the Treasury. He was merely to record it. His duty, under that act of Congress, was like that of a clerk of a court, who is required to record its proceedings; or, of an officer appointed by law to record deeds. * * * * * The duty in such cases is merely ministerial."

In Brashear *vs.* Mason, in which it was sought to compel the payment of arrearages of pay due the relator as an officer in the navy; in Reeside *vs.* Walker, 11 How., 272, where it was sought to compel the Secretary of the Treasury to pay a debt due from the United States, for which no appropriation had been made by law; and in United States *vs.* Seaman, where it was sought to compel the Superintendent of Public Printing to place a document in the hands of the printer of the Senate in the place of those of the printer of the House of Representatives; and in the following cases the writ was refused:

United States *vs.* Guthrie, 17 How., 284.

Comm of Patents. vs Whitely. 4 Wall. 522

United States *vs.* Commissioner of the Land Office, 5 Wall., 563.
The Secretary *vs.* McGarrahan, 9 Wall., 298.

In Kentucky *vs.* Governor of Ohio, 24 How., 66, the Court held, that the duty of the governor of a State to deliver up a fugitive from justice from another State was a purely ministerial duty, and did not involve any discretionary power, and that the writ of mandamus would be the proper remedy to compel its performance. But the Court were of opinion, that it had no power to coerce the governor of a State, even in such a case as that.

In Gaines *vs.* Thompson, 7 Wall., 347, this Court decided that the Secretary of the Interior and Commissioner of the Land Office could not be controlled by a suit in equity in respect of their action in cancelling an entry for land, on principles as applicable, in the language of Mr. Justice Miller, to the writ of injunction as to a writ of mandamus.

In Mississippi *vs.* Johnson, 4 Wall., 475, the present Chief Justice said, in commenting upon Marbury *vs.* Madison and Kendall *vs.* The United States: "In each of these cases nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act, and that performance, it was held, might be required by mandamus."

These are believed to be all the cases in which the writ of mandamus has been sought in this Court to compel the heads of Departments and Bureaus at the Federal Capital to perform any duty, and, as has been before said, in only one of them did the writ actually issue. These cases settle and illustrate the law of this Court too fully to require any extended examination of the decisions of other courts.

In the case of the Commonwealth *vs.* Cochran, 5 Binn., 87, it was decided, that a mandamus would lie to the Secretary of

the Pennsylvania land office to compel him to make the calculations of purchase-money and interest on lands sold, if he had omitted or wholly refused to do it; but it would not lie to command him in what manner to make the said calculations, that act not being merely ministerial; nor, if he had, under the direction of the board of property, made the calculations in an erroneous manner, would it lie to compel him to make them in a proper manner.

In the State *vs.* the Governor, 5 Ohio St., 528, the supreme court of Ohio was of opinion that it had power to issue a writ of mandamus to the Governor to compel him to do a ministerial act, which might have devolved upon any other officer of the State, and which had no special connection with his duties as Chief Magistrate of the State. Even admitting, (what may well be questioned, after Kentucky *vs.* The Governor of Ohio,) that a court even in such a case as this can control the action of the Chief Magistrate of the State, the depositary of the whole executive power, it is apparent that the case, in principle, extends no further than Kendall *vs.* the United States.

The English cases, where it has been attempted to control the Lord Commissioners of the Treasury, in respect of the supervision of the revenue, conform to the doctrine as established in this Court.

In the King *vs.* the Lords of the Treasury, 4 A. & E., 286, 976, the Lords of the Treasury, on the application by a person claiming a pension, for payment, informed him that he might receive it from a treasury officer, whom they named. That officer declined paying, inasmuch as he had no authority from the Lords of the Treasury; and, they being again applied to, refused to give such authority, except on condition that the party would forego certain legal proceedings, which he refused to do. Upon these facts, the court issued a writ of mandamus to them, commanding them to issue a minute for the payment of the pension. Subsequently, when the minute had been re-

voked, the court determined that it had no further jurisdiction in the matter.

In the King *vs.* The Lords of the Treasury, Ibid., 984, 990, 996, where the writ was applied for and refused, the Attorney General declared that steps would have been taken for bringing the previous case before a court of error, if it had been thought advisable, under the circumstances, to contest the mandamus. And Lord Denman said: "All that the court said there was, that the Lords of the Treasury must make a return, and show why the money was not paid over."

In the Queen *vs.* The Lords of the Treasury, 16 Q. B., 357, where the question was, whether an annuity, granted out of the Consolidated Fund to Queen Adelaide, consort of William the Fourth, was apportionable, the Attorney General expressly waived the question of jurisdiction, as the Treasury was willing to submit the question to the court, and the rule *nisi* was discharged on the merits The statement of Lord Campbell, therefore, that it was a proper case for mandamus was merely *dictum*, and, as an adjudication, extends no further than Kendall *vs.* The United States.

In the other cases, when applied for, the writ seems to have been denied.

In re Baron de Bode, 6 Dowl., 776, 792.
Ex parte Walmesley, 1 B. & S., 81.

In Ellis *vs.* Earl Grey, 6 Sim., 214, Vice Chancellor Shadwell granted an injunction to restrain the Lords of the Treasury from paying compensation for an office which had been abolished, on the ground that the bill did not seek "to interfere with any public duty which the Lords of the Treasury have to discharge, or with any discretion which they have to exercise in their capacity. But it seeks to restrain them from doing a mere ministerial act, with a view to secure the money for the parties who may be decreed to be entitled to it."

The doctrine established by these cases and, particularly, by Decatur *vs.* Paulding, is decisive of the present application. This is not the case of a duty imposed upon the Secretary of the Treasury by law, not affecting his official duties as such, and which may be performed by anybody else; neither is it a case in which nothing whatever is left to his judgment and discretion. Assuming the fullest authority which is claimed on the other side for the action of the accounting officers, there still remained to be determined by the Secretary, whether there were unappropriated funds sufficient to meet this claim, and, likewise, further than that, whether the public exigencies would permit those funds to be applied to the payment of this claim, and did not require them to be reserved for the discharge of more pressing demands upon the Government; considerations which, in time of war, might require of the person intrusted with the control of the revenue the most serious deliberation. It is immaterial for the present discussion, whether there are funds unappropriated, as the petitioners allege, sufficient to meet this claim, and whether it can be paid at once without public detriment. These facts merely go to show that Mr. Boutwell may have decided wrongly. They do not show that there was not something for him to decide. The construction of the statute, as will be seen by what is said hereafter, is a matter open to question, and it is now a question in issue between these parties, whether the regulations established by Mr. Chase, when Secretary of the Treasury, for payments under this statute, and which have been confirmed by Mr. Boutwell, did or did not conflict with it.

The authority to draw warrants from the Treasury, conferred by the statute of 1789, has been in no sense repealed or modified by subsequent legislation, and it is the very highest executive power which is intrusted to the head of the Treasury Department. If it were made a purely ministerial one; that is to say, if the approval of accounts by the accounting officers and the requisitions made by the other Departments of the Government,

were so conclusive upon the Secretary that he had no discretion whatever in regard to signing warrants, his duties in this respect would become a mere form, and, indeed, the necessity of going through the form and requiring his action, instead of having the warrants drawn directly upon the Treasury by those wanting money, would not be very apparent. And yet, in order to maintain this application, the court must decide all this, for, if the smallest degree of judgment or discretion is required, then the duty becomes an executive one, and mandamus is not the proper remedy.

But there is another view of this question, which applies more strongly to the case of a writ of mandamus against the Secretary of the Treasury than to any other. One of the most familiar attributes of sovereignty is immunity from suit, except with the sovereign's own consent. It is apparent, that if the courts can control the action of the Secretary of the Treasury, as the officer having charge of the public revenue, in the performance of his duty as such, and can compel him to pay money where he refuses to do so, and where the President, the chief executive officer, does not interfere to compel him to do so, that this immunity from private suit may be very materially abridged. In this country, where the sovereignty is impersonal, it can act in no other wise than by officers as its agents; and controlling the action of the officers is controlling the action of the sovereign power itself. For this reason, the cases both in England and in the several States of the Union show, that the courts have acted with far greater caution in cases of mandamus sought against the high executive officers of the State than in cases where the writ has been sought against inferior officers. There are, undoubtedly, many cases where the officers of public corporations have been controlled in their action, and have been compelled to pay over money to creditors where no court would dream of exercising the same degree of control over an officer representing the sovereignty of the State. And even if the distinction between these two classes of officers may not always

have been perceived or precisely defined, yet the difference between the two classes is obvious. For counties, cities, and towns enjoy no immunity from private suit, and their rights in that respect are in nowise infringed upon by granting the writ, whilst the writ itself furnishes an efficient remedy where an action at law, or even a bill in equity, might not be effectual to enforce the relator's rights. But it is very evident, in reading the cases, that the higher the officer is the more cautiously do the courts proceed when it is sought to control him, and the history of the writ would seem to indicate, that having been first issued in England, under the jurisdiction possessed by the Court of the King's Bench, which has special supervision of all inferior courts, magistrates, and officers, it has gradually been extended so as to reach officers of co-ordinate power and dignity with the court which grants it, in cases concerning purely ministerial duties, and whose hardship pressed strongly upon the desire of the court to furnish, if possible, a remedy. The fact that it was never sought for in England to compel the payment of money out of the public treasury before 1835 is a strong argument that the writ was never intended for any such purpose.

III.

But the decision of the accounting officers is not conclusive in any case upon the Secretary of the Treasury.

By the act of September 2, 1789, (1 Statutes at Large, 65,) there were created a Treasury Department and certain officers thereof, among which were the Secretary, a Comptroller, an Auditor, and a Treasurer. Among the duties imposed upon the Secretary of the Treasury by the second section, which has been before cited, were "to decide on the forms of keeping and stating accounts and making returns, and to grant under the limitations herein established, or to be hereafter provided, all warrants for monies to be issued from the Treasury, in pursuance of appro-

priations by law." The duty of the Comptroller was "to superintend the adjustment and preservation of the public accounts; to examine all accounts settled by the Auditor, and certify the balances arising thereon to the Register; to countersign all warrants drawn by the Secretary of the Treasury, which shall be warranted by law." It was made the duty of the Treasurer "to receive and keep the moneys of the United States, and to disburse the same upon warrants drawn by the Secretary of the Treasury, countersigned by the Comptroller, recorded by the Register, and not otherwise." Section 5 enacted "That it shall be the duty of the Auditor to receive all public accounts, and after examination to certify the balance, and transmit the accounts with the vouchers and certificate to the Comptroller for his decision thereon."

By the act of March 3, 1817, (3 Statutes at Large, 366,) which added to the Treasury Department four auditors and a comptroller, the keeping of the accounts of the War and Navy Departments was assigned to the officers thus created, and it was enacted by section 7, "That the Treasurer of the United States shall disburse all such moneys as shall have been previously ordered for the use of the War and Navy Departments by warrants from the Treasury, which disbursements shall be made pursuant to warrants drawn by the Secretary of the War and Navy Departments, respectively, countersigned by the Second Comptroller, and registered by the Auditors, respectively."

By the act of May 7, 1822, section 3, (Ibid, 689,) which is now in force, it is enacted, "That all moneys appropriated for the use of the War and Navy Departments, shall, from and after the day and year last aforesaid, be drawn from the Treasury, by warrants of the Secretary of the Treasury, upon the requisitions of the Secretaries of those Departments, respectively, countersigned by the Second Comptroller of the Treasury, and registered by the proper Auditor." So much of the preceding act of 1817 as was repugnant ~~with~~ this act, was expressly repealed.

Up to 1861, when the act upon which this application is founded, was passed, there was nothing indicating in the statutes an intention on the part of Congress to render the Secretary of the Treasury, as to requisitions drawn upon him, merely a ministerial officer, bound by the decisions of the accounting officers of his Department. On the contrary, it is evident that the intention of Congress was, that, as to all moneys to be drawn from the Treasury, each officer, including the Secretary, was to be a check upon the others. His action was required, not as a matter of form, but that he might himself examine, and, to a certain extent, ratify and approve of the action of the others; and, as under exceptional circumstances, the Auditor or the Comptroller would be justified in refusing his signature when demanded for the purpose of passing accounts and drawing money from the Treasury, so the Secretary of the Treasury can withhold his signature, if, in his judgment, any money is sought for purposes which are not allowed by law, or even, as we contend, where there is no peremptory statute to the contrary, if the state of the Treasury or the public exigencies are such that the money cannot safely be spared.

If a case should arise where the Secretary of the Treasury wrongfully refused to draw a warrant on the requisition of the Secretary of War, or of another of the great officers of the State, for money which is needed for the purposes of his Department, the remedy would seem to be by application to the President, as the chief executive officer of the nation, and the superior of both, and not by an application to this or any other court for a writ of mandamus. If, as respects any private claim, the Secretary wrongfully withholds his warrant, and the President does not see fit to interfere, the hardship is no greater than that which may occasionally press upon all people dealing with the Government, in consequence of its immunity from suit.

To put an extreme case to test this principle, if the Secretary of the Treasury is convinced that the accounting officers have entirely mistaken the law, or that they have been imposed upon

by false testimony, or if, as might happen, they are in a conspiracy with other persons to defraud the Treasury, has he no power over their action to protect the revenue of the Government which is specially confided to his care? Yet in such a case as that, in order to be of service in protecting the Treasury, he must be able to examine accounts and to exercise some judgment and discretion in regard to applications for warrants which may be made to him, and occasionally refuse them in cases where the accounts have been passed upon and approved by all the other officers whose action is required.

The act of March 30, 1868, (15 Statutes at Large, 54,) which enacts that the act of March 3, 1817, *supra*, "shall not be construed to authorize the heads of Departments to change or modify the balances that may be certified to them by the Commissioner of Customs or the Comptroller of the Treasury, but that such balances, when stated by the Auditor and properly certified by the Comptroller as provided by that act, shall be taken and considered as final and conclusive upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts," has no application to the power confided to the Secretary of the Treasury by the act of 1789 in regard to drawing warrants for money. Giving it the broadest application it only applies to him as a head of a Department whose accounts pass through the hands of the accounting officers, and in the same manner in which it applies to the heads of the other Departments of the Government. But his right to exercise his judgment whenever a demand is made upon him for a warrant on the Treasury resting on the act originally creating his office, and in nowise affected by the act of 1817, of which this was amendatory, remained the same as it was before the passage of this act. The proviso in that act shows that it refers to the warrant or requisition drawn by the head of a Department upon the Secretary of the Treasury for any balance certified to him by the Comptroller, but does not interfere with the discretion of the Secretary of the Treasury, even if it does of other heads of De-

partments, in regard to making a requisition or drawing a warrant for money.

See Congressional Globe for 1867–'8, pt. 1, p. 218.

Otherwise, how can the case be revised by Congress or the courts, as provided for in the statute? If the Secretary of War is compelled to draw a requisition on the report of the accounting officers, or the Secretary of the Treasury to draw a warrant on the Treasury whenever they report an amount to be due from the Government, the money will be taken out of the Treasury and the case be beyond the power of Congress or the courts to revise and correct any errors which the accounting officer may have committed. The act can have full effect without giving it this extraordinary construction. If Congress intends to reduce the control of the Secretary of the Treasury over the Treasury to a mere ministerial or clerical duty to be performed at the direction of his subordinate officers, it will probably do so in language, the meaning of which cannot be mistaken.

The act of June 25, 1868, section 7, (15 Statutes at Large, 76, 77), does not limit the power or discretion of the Secretary of the Treasury, but was merely passed for the purpose of enabling the heads of Departments to send doubtful cases to the Court of Claims.

IV.

The act of 1861 does not apply to the troops of the United States, but to State troops, and consequently is not a case in which the action of the Secretary of War, or of the War Department, is required. While it was perfectly proper for the

Secretary of the Treasury to ask the assistance of the Secretary of War in settling these accounts, he is not compelled by law to do so; and consequently, even if in any ordinary case the Secretary of the Treasury is compelled to obey the requisition of the Secretary of War for money, he is not compelled to do so in this case. And while the vouchers upon which the accounts are to be settled are to be filed and passed upon by the proper accounting officers of the Treasury, yet the principles upon which the settlements are made, the regulations to govern them, and the construction to be put upon the statute, are matters which are confided to the Secretary of the Treasury alone. It is he who is directed to pay the money; and, provided that the vouchers are filed and passed upon by the accounting officers, (which is the only limit upon his authority,) the whole thing is intrusted to his discretion and direction. The regulations established by Mr. Chase, were, therefore, entirely within his power to make.

The fact that a warrant had been actually signed by the Acting Secretary of the Treasury does not take this case out of the power of the Secretary of the Treasury to control, even if the warrant had not been signed conditionally. A warrant upon the Treasury, unlike the case of a commission fully completed, as in the case of Marbury *vs.* Madison, must be within the power of the Secretary to revoke or modify until it has actually passed out of his manual control.

V.

Finally, it is perfectly well-settled that the writ of mandamus will not issue where the party has any other remedy, and in this case the Commonwealth of Kentucky has a remedy either by an action of detinue for the warrant or the amount thereof, or it can sue in the Court of Claims.

Mr. Boutwell's opinion is annexed to this brief for the convenience of the court.

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B. H. BRISTOW,
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C. H. HILL,
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APPENDIX.

TREASURY DEPARTMENT,
Washington, August 2, 1871.

Opinion of the Secretary of the Treasury in the matter of the claim of the claim of the State of Kentucky for reimbursement of the sum of five hundred and twenty-five thousand, two hundred and fifty-eight dollars and seventy-two cents ($525,258.72) *paid to State militia for services rendered during the years* 1863, 1864, 1865, *and* 1866.

This claim was filed in 1866, and it is made under the provisions of "an act to indemnify the States for expenses incurred by them in defense of the United States," approved July 27, 1861.

Secretary Chase when providing for the execution of this act prescribed a series of rules, the second of which is in these words:

"It is only for expenditures on account of troops, officers, or men that have been, or may be, mustered and received into, or actually employed in, the service of the United States, that reimbursements will be made.

"Organizations raised, or attempted to be raised, but not mustered and received into, nor actually employed in, the service will not be recognized. Nor will any reimbursement be made by the United States of expenses incurred in organizing, equipping, and maintaining troops for State purposes, or home guards, whether called out by State or other local authority, unless such troops were called out and such expenditures incurred at the request or under the authority of the President or the Secretary of War."

It is not contended that the troops, for whom reimbursement is asked, were ever mustered into the service of the United States,

nor is it contended that they were called out at the request or under the authority of the President or the Secretary of War.

Upon these facts the rule quoted is a bar to the claim.

It is, however, sought to bring the claim within the rule; and in support of this effort special reference is made to the certificate of General Sherman, the communication of General Vincent, and the approval of the Secretary of War. The certificate of General Sherman is as follows:

"WASHINGTON, D. C., *June* 30, 1871.

"I certify that prior to beginning the Atlanta campaign I sent for Governor Bramlette, of Kentucky, to come to me in Nashville, and in May or April, 1864, revealed to him the plans and purposes of the campaign, and that I expected him, as the executive of Kentucky, to guard and protect our lines of supply, all of which came through Kentucky, and to guard against raids or invasions from the east or west.

He expressed his perfect willingness to do so, and on the whole our lines were protected and our success was thereby encouraged and insured. My route, as is well known, was to Savannah, Ga., and thence to Washington, D. C., so that I did not again see Governor Bramlette till the war was over, and I was never able to ascertain how or in what manner he disposed of his State militia to the end proposed, but I do regard his efforts as meritorious to the cause of the United States in a high degree.

("Signed.) "W. T. SHERMAN, *General.*"

General Thomas M. Vincent, assistant adjutant general, United States army, in his communication, dated June 30, 1871, after enumerating various documents filed in the case, recommends "that the troops be recognized as having been actually employed in the service of the United States; that recognition being deemed necessary by the Treasury Department in order that the claim may be allowed under act of July 27, 1861, to indemnify the States for expenses incurred by them in defense of the United States."

On the same day the recommendation of General Vincent is approved without comment by the Secretary of War.

The claimants offer as a precedent the order of Secretary Stanton of July 9, 1867, whereby he recognized certain troops who had been called into service in the State of Kentucky in 1861.

There is, however, a manifest difference between the two cases. The troops whose services were recognized by Secretary Stanton were called into the service of the United States by General Nelson, who was then an officer of the United States, commanding under the President, and subject to the directions of the Secretary of War.

Upon a well-understood principle, it was competent for the Secretary of War, or the President, to recognize these troops as having been called into service by proper authority, although neither the President nor the Secretary of War knew of the call until after it was made.

The order of Secretary Stanton was specific; it met the points at issue, and placed the troops called out by General Nelson within the second rule of Secretary Chase, before quoted.

It is as follows:

"WAR DEPATMENT,
"*July* 9, 1867.

"It appears, from official reports of Major General George H. Thomas, that on the 15th of September, 1861, the Home Guards had been called out by General Nelson, and were then in the actual employment of the United States, and on duty as troops of the United States, and were continued on duty, and were employed by General Thomas. There appears to be in the War Department no written or official evidence of authority granted by the President, Secretary of War, or General Cameron, to General Nelson for calling out these troops. But the legal presumption is (under the special circumstances then existing) that proper authority was given.

"This Department is, therefore, of opinion that the Home Guards mentioned were actually employed in the service of the United States under proper and legal authority, and should be

regarded as such by the accounting officers of the Government."

("Signed) EDWIN M. STANTON.
"*Secretary of War.*"

In the case under consideration the troops were not called into service by the authority of the President or of the Secretary of War, or by any officer of the regular or volunteer army of the United States; but they were in the service of the State of Kentucky by State authority, under officers appointed by the State, and, as far as is shown by the evidence, they were never attached to the command of any officer of the army of the United States.

It appears to be true, as stated by Governor Bramlette and by General Lindsey, the adjutant general of Kentucky, that during the period mentioned the troops acted in concert with the United States forces, and regarded the orders of the United States officers.

General Lindsey, in his affidavit of July 12, 1870, says that "the troops referred to were directed in every way to co-operate with the United States troops, and to obey and carry out all orders and instructions given to them by United States officers."

A considerable portion of the service for which reimbursement is asked, was performed after the surrender of Lee and Johnston; and the mustering out of the troops was by State authority, and at various times, from the 10th of January, 1865, until the 23d of October of the same year.

Adjutant General Lindsey says: "That they were kept in service until those dates owing to the unsettled condition of the country and the presence of armed bands of 'guerrillas,' 'bushwhackers,' and other outlaws; that the service of said troops, until mustered out, was regarded as essential to the peace and safety of the State, and they were mustered out of service as early as it was considered prudent to disband them."

The act of July 27th, 1861, has received a legislative con-

struction by the act approved July 17th, 1862, (12 Stat., p. 600,) entitled, "An act to allow and pay to the State of Mis-"souri the amount of money expended by said State in the arm-"ing and paying of troops employed in the suppression of in-"surrection against the laws of the United States."

In that act, provision is made for an allowance to the State of Missouri "for all sums of money expended by said State in "the arming, equipping, subsisting and paying of troops organ-"ized under the ordinances of the Convention of said State, "passed during the year 1861, *and employed in concert* with the "Federal authorities in suppressing insurrection against the "United States, and enforcing the laws thereof." An act approved April 17, 1866, (14 Stat., p. 38), entitled, "An act to "reimburse the State of Missouri for moneys expended for the "United States in enrolling, equipping and provisioning mili-"tia forces, to aid in suppressing the rebellion," authorizes the commissioners appointed "to ascertain the amount of money "expended by the State of Missouri." * * * * "Allowing "only for disbursements made and amounts assumed by the "State for enrolling, equipping, subsisting, and paying such "troops as were called into service by the Governor, *at the re-"quest of the United States Department Commander*, command-"ing the district in which Missouri may at the time have been "included."

The first statute referred to proceeds upon the theory that State troops employed to act in concert with the United States troops could not be paid under the act of July 27, 1861; and the statute of April 17, 1866, is equivalent to a declaration that troops called into the service by the Governor, though at the request of the United States Department Commander, could not be recognized under the act of July 27, 1861.

The propriety and legality of the rules made by Secretary Chase have thus been recognized and affirmed by subsequent legislation.

General Hewitt, agent for the State of Kentucky, in his

written argument filed in the case, admits that the Secretary of the Treasury, in recognising the claim, must declare in effect that the second rule of Secretary Chase, already quoted, is invalid, as being contrary to law.

General Hewitt, referring to the second rule, uses this language: "The Treasury Department could make no rule to "limit or restrict the operation of this act, by requiring evi- "dence of the performance of other conditions.

"The second rule adopted under it must be construed by it; "and, if repugnant to it, *the law prevails*.

"The first clause of the rule conformed to the law. It au- "thorizes the payment of expenditures on account of troops 'ac- "tually' employed in the service of the United States, but the last clause does not; for nothing in the law requires that the "troops should have been called out and the expenditures in- "curred at the request or under authority of the President or "Secretary of War."

I agree that the claims cannot be paid if the second rule referred to is observed by the Secretary of the Treasury; but I do not admit that the rule in question was contrary to law, or that it limited unreasonably the scope of the statute.

There are, however, two other sufficient answers to the suggestion.

One is that the present Secretary of the Treasury would not be justified in setting aside a rule of his predecessor unless the reasons requiring it are imperative. And, secondly, the rules were prepared and made known to the country before any considerable expenses were incurred by the several States, and long before the expenses were incurred which are the basis of the claim under consideration.

The State of Kentucky, therefore, in common with other States, had knowledge of the rules by which the Department would be governed in passing upon such claims as might be presented for the services of troops employed in suppressing the insurrection.

These considerations, taken in connection with the fact that Congress on two occasions has given a legislative construction to the act of 1861, consistent with the rules then established by Secretary Chase, leave no ground on which this claim can be paid without the specific authority of Congress.

It is also suggested in the argument of General Hewitt, that, inasmuch as the claim has been passed by the accounting officers, the Secretary of the Treasury has no discretion in the matter, and that it is his duty to sign the warrant and allow payment to be made, whether or not such payment is approved by his own judgment.

This theory of the duty of the Secretary of the Treasury cannot be admitted.

Every Secretary of the Treasury, as far as I am informed, has practically recognized it to be his duty to pass upon all claims as far as they are brought to his notice; and in no instance in the history of the Government has this power on the part of the Secretary of the Treasury been waived.

Such is my conviction of the necessity for its occasional exercise, that I shall do nothing calculated to impair the authority of the Department in this particular.

The acting Secretary of the Treasury, Mr. Hartley, signed the warrant on the 30th day of June, at the urgent request of the agent of the State of Kentucky, for the purpose, as I am informed by Mr. Hartley, of giving to the State the benefit of the appropriation, which ceased to be available on the 30th of June, and upon the express understanding, which was, in fact, carried into effect, that the warrant was to be held in the Department, subject to the final decision of the Secretary of the Treasury.

After careful consideration, I am of opinion that the act of July 27, 1861, does not authorize the Secretary of the Treasury to pay the claim of the State of Kentucky.

GEO. S. BOUTWELL,
Secretary of the Treasury.

Memorandum—

5 Bissm 102

15 Stat 57.

relates only to the
Statement of the amount
Does not the Secretary
as to appropriation

16 Stat 251,
Repealed so much
from & after the 30
June 1871—
from & after the
the day—
said issue & conversion
not to be continued
by law — did subject
cancellation deed ac-
cepted — cancel it &—
Can now & cancel it—

In the Supreme Court of the United States.

ORIGINAL No. , DECEMBER TERM, 1871.

THE

COMMONWEALTH OF KENTUCKY

ON THE RELATION OF PRESTON H. LESLIE,
GOVERNOR OF SAID COMMONWEALTH, &c.

VS.

GEORGE S. BOUTWELL,

A CITIZEN OF THE STATE OF MASSACHUSETTS, AND SECRETARY OF THE TREASURY OF THE UNITED STATES.

BRIEF OF RELATOR IN REPLY.

GEORGE McKEE,
ALLEN A. BURTON,
BARTLEY & CASEY,
Of Counsel for Relator.

WASHINGTON:
PRINTED BY POWELL, GINCK & CO.
1871.

In the Supreme Court of the United States.

THE COMMONWEALTH OF KENTUCKY, *on the Relation of Preston H. Leslie, Governor of said Commonwealth, &c.*, vs. GEORGE S. BOUTWELL, *Secretary of the Treasury.*	ORIGINAL No. Dec. Term, '71.

BRIEF OF PLAINTIFF IN REPLY.

HAS THIS COURT ORIGINAL JURISDICTION OF THE CAUSE?

The defendant contends that this court has not jurisdiction—

1st. Because the suit is against him as Secretary of the Treasury in his official capacity, and not as George S. Boutwell, a citizen of the State of Massachusetts. And that it is therefore a demand against the United States.

To this we answer—

1st. The defendant does not cease to be a citizen of Massachusetts by accepting and filling the office of Secretary of the Treasury. He remains a citizen of the State, and as such exercises all his rights of residence and domicile. And he can have but one domicile at the same time.

2d. It is a misapprehension to suppose that the suit is either actually or virtually against the United States. The United States admit and concede our claims. And have provided and appropriated the money to pay it. They have

placed this money in the hands of Mr. Boutwell, for our use, and ordered him to pay it to us. And he refuses. We sue him as a trustee or stakeholder. In the case against Kendall, in 12 Peters, the suit was brought in the name of the United States as plaintiff, on the relation W. B. Stokes et al. Our right depends upon a special law, which defines very clearly our rights and points out specifically his duty, to wit, the act of Congress of July 27, 1861.

Besides it would be an absurdity to say that he acts for and as the United States, when he acts against a valid statute of the United States. It is the precise case met by the reasoning of Mr. Chief Justice Marshall, in *Marbury* vs. *Madison*, where referring to the duties of a cabinet minister, he says:

"But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himsel injured has a right to resort to the laws of his country for a remedy."

The very point is decided in *Osborn* vs. *The Bank of the United States*, 9 Wheat. 846. And in *State of Georgia* vs. *Stanton*, 6 Wall., 75, Mr. Justice Nelson says in the latter case:

"By the second section of the third article of the Constitution, 'the judicial power extends to all cases in law and equity arising under the Constitution and laws of the United States,' &c., and as applicable to the case in hand "to controversies between a State and citizens of another State," which controversies under the judiciary act may be brought, in the first instance in this court, in the exercise of original jurisdiction, and we agree that the bill presents a case which, if it be the subject of judicial cognizance, would, in form, come under a familiar head of equity jurisdiction."

This is a direct decision on the very point.

Though the Constitution does not, in terms, extend the judicial power to all controversies between two or more

States, yet it in terms excludes none, whatever may be their nature or subject.

This court, in construing the Constitution as to grants of powers to the United States, has ever held that an exception of any particular case, presupposes that those which are not excepted are embraced within the grant or prohibition, and have laid it down as a general rule that where no exception is made in terms, none will be made by mere implication and construction.

State of Rhode Island vs. *State of Massachusetts*, citing 6 Wheaton, 378 ; 8 Ib., 489 ; 12 Ib., 438 ; 9 Ib., 206.

3d. If the Secretary of the Treasury were a citizen of Kentucky this suit might not be necessary ; Massachusetts it is not likely will have any occasion for a similar one while Mr. Boutwell is Secretary of the Treasury.

We think that every reason of prudence, convenience and policy which gives jurisdiction to this court, where a State is a party, applies with peculiar force to this case. It was clearly forseen, that among a large number of separate States, there would inevitably spring up rivalries, jealousies, animosities and clashing and conflicting interests. To settle and adjust these controversies and hold the scales even, where one at least of the parties was to be of such dignity and power, was deemed appropriate for the highest tribunal of the nation.

It is now urged that the United States, through their highest court, protect the States from all wrong or injustice, except that of their own offieers. That they only permit those armed with their power to violate these State rights with impunity.

4th. Whether, if the Secretary of the Treasury were a citizen of the District of Columbia, or of one of the Territories, this conrt would have jurisdiction of the case, we need not now debate.

We apprehend however, that the broad, general terms of

the Constitution as applied to this court, one not to receive the same technical and narrow construction that is applied to a statute conferring jurisdiction upon a court of limited power and jurisdiction.

The reasoning is in a circle ; that we cannot sustain the suit against Mr. Boutwell, as a citizen of Massachusetts, because he is Secretary of the Treasury ; and we cannot sustain a suit against him as Secretary of the Treasury, because he is George S. Boutwell, a citizen of Massachusetts.

5th. It is again objected that Congress cannot authorize this court to issue a *mandamus* to a public officer. To sustain this position they cite Marbury vs. Madison. In that case this court held that Congress could not give this court jurisdiction of parties, other than those named in the Constitution. But it has never yet been decided that this court could not administer a remedy provided by statute, in a case where it has jurisdiction of the parties.

But this court has uniformly held that its powers under the Constitution are sufficient to enable it to exercise the original jurisdiction conferred without any statute to prescribe and regulate the forms and manner of proceeding. Why therefore not issue a *mandamus* to a public officer iin cases where it has jurisdiction ? New Jersey vs. New York, 5 Peters, 283 ; Rhode Island vs. Massachusetts, 12 Peters, 657. " Original jurisdiction so far as the Constitution gives a rule, is coextensive with the judicial power." Osborne vs. The Bank, 9 Wheat., 820.

II. It is contended that the thing demanded is not a ministerial act, but one involving option and discretion.

It is claimed that supposing an appropriation a final settlement and a right to payment, yet the Secretary must judge whether the public exigencies would permit these funds to applied to be the payment of this claim.

We answer:

1st. Congress decided that question. It belonged to them, and not to the Secretary. He had no right or power in the premises. The revenues and finances are under the control and disposal of Congress alone.

"It would be an alarming doctrine that Congress cannot impose upon any executive officer, any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution, and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the discretion of the President. And this is emphatically the case when the duty is of a ministerial character." 12 Peters, 210.

"Where the law has given to parties rights, as growing out of certain facts, there discretion ceases; if the tribunal charged with the administration of justice commits an error in such a case, its acts must be subject to review." *The People* vs. *The Supreme Court of New York*, 10 Wendell, 291.

This language of the court was in a mandamus case.

"The conclusion to be deduced from all the authorities is: That where power is given to public officers in the language of the act before us, or in equivalent language—whenever the public interest or individual rights calls for its exercise—the langauge though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right and prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless." Mr. Justice Swayne, in *Supervisors* vs. *United States*, 4 Wallace, 446–7.

2d. If that were an excuse at all, the exigency must be pleaded and shown.

3d. Such a principle would make the Secretary the supreme and ultimate arbiter in every case. He might pay or refuse any claim at his own pleasure.

4th. If the Secretary may refuse to pay on these grounds, why not the Treasurer or Sub-Treasurer? If he has judgment, option, and discretion in the matter, why not they?

5th. The argument that to compel the payment by *mandamus* subjects the sovereign to suit, without his consent, is aside of the question, for in the first place, if the demand is in dispute there can be no *mandamus*. There must be a settled, liquidated, undisputed demand against the United States. In the next place, there must be an appropriation by Congress to pay this settled demand. And in the third place, there must be the duty upon the defendant by law to make the payment, as a mere custodian, trustee, or stake-holder of the fund out of which payment is to be made.

6th. Such an officer acting under the law in a ministerial capacity, represents no part of the majesty or sovereignty of the nation, but is, himself, the mere agent and servant of the law. As Lord Denman said, the mere "*conduit pipe*" through which these public funds are to flow to their designated place.

7th. Our suit is not against the United States. They have not refused to pay. On the contrary, they have adjusted and settled our account, struck the balance in our favor, placed the money to pay it in the hands of their servant, and directed him to pay it to us, and he refuses to hand it over. We are trying to make him obey this command.

It is probably true that England has been a long time in reaching that degree of civil freedom, in which an individual could obtain a *mandamus* against a titled noble, holding a high office under the British Crown, to compel the performance of a public duty, in which that individual

had a vested interest. But the cases cited show that individual right, and judicial independence, have at length attained there to that position.

But if the position assumed, and the arguments advanced here by the representatives of the executive government of this nation to-day, be tenable, then are the powers, privileges, prerogatives and immunities of a cabinet minister here greater than they ever were in England—and immeasably greater than they are now—the condition of things in England may be owing in part to the advancing spirit of freedom throughout the world, and partly to the reflex influence of our own institutions upon the mother country.

A decision such as the department of justice asks your honors to make in this case would be a retrograde movement. It would be in effect to sanction the special exemptions, powers and prerogatives claimed for a cabinet minister far beyond that possessed under a monarchy in England.

8. In the case of Decatur *vs.* Paulding, 14 Peters, 497, the *mandamus* was refused on the express ground that the acts under which the claim was made, required the exercise of judgment and discretion by the Secretary of the Navy in paying or withholding the amount claimed. This is made very plain by the opinion of Mr. Chief Justice Taney, page 515. The case of United States *vs.* Kendall is expressly re-affirmed.

In the case of Brashear *vs.* Mason, 6 How., 92, the relator claimed pay from the United States as an officer of the Texan Navy. The case involved his right to the office, which was contested and disputed, and which could not be determined in the collateral proceeding by mandamus for his pay; his right to the pay was in doubt and dispute. The same remark applies to the case of United States *vs.* Guthrie, 17 How., 284, with the additional fact

in this case, and that of Reeside *vs.* Walker, 11 How., 272, that no appropriations had been made by Congress to pay the claims.

United States *vs.* The Commissioner of the Land Office, 5 Wall., 563, was an attempt to control the decision of an officer in a case between conflicting claimants, involving discretion and judgment of a semi-judicial character. Such an application was simply preposterous, and both the court below and this court so treated and regarded it.

In the McGarrahan case, 9 Wall., 298, this court reversed the judgment below, because before the patent could issue to the relator, the Secretary of the Interior under the law was to hear and examine proofs, and was to exercise his option, judgment and discretion in the matter.

If the Secretary of the Treasury has a right under the law to hear proofs in this case, re-examine the facts, make any decision whatever upon our rights, we admit that the *mandamus* will not lie, however erroneous his decision may be. No one of the cases cited infringe in the slightest degree on the principle of the cases of Marbury *vs.* Madison and United States *vs.* Kendall. That remains intact.

III. That the act of June 30, 1868, does not include the Secretary of the Treasury.

1st. The argument is still put forth that the only remedy is to apply to the President. If it were an executive duty, this would be so, and clearly *mandamus* would not lie. He would then be the organ of the President. But he is not. The duty is specific, and imposed by law in relation to the revenues, finances, and debts of the nation, subjects that belong exclusively to Congress, and over which the Executive has no power, except such as the law confers. Congress could just as easily have confided this duty to any one else. The President's command to do or not to do it, amounts to nothing. It don't make the law, so cannot break it.

2d. If through fraud or mistake a claim should be allowed in the War Department, and this becomes first known to the Secretary of the Treasury, his course is a very plain one. It is not to set himself up as a court of errors and appeals—to revise, correct, and reverse the decisions of the other departments—but to call the attention of his co-cabinet minister to the matter, to furnish him with the facts and proofs, and submit it to his judgment. This officer can then act as he is directed in such cases by the act of March 30, 1868, or of June 25, 1868.

3d. But does the act of 1868 include the Secretary of the Treasury? Do his prescriptive prerogatives override and annul a clear and positive act of Congress? This appears to us is the position here taken. The act says the settlement shall be final and conclusive upon the "executive branch." Is he part of the executive branch? If not, what else is he? But the law goes further and says this settlement shall be subject to revision "*only*" by Congress or the proper courts. To make the argument at all plausible, we must insert at the end "*or the Secretary of the Treasury.*" Have we any grounds, warrant, or authority for such an interpolation? Being subject only to revision by Congress or the courts, excludes all other revising power—upon the maxium, "*Expressio unius, est exclusio alterius.*"

IV. But he must revise it first in order to enable Congress or the proper courts to revise it. This is clearly founded upon a misapprehension of the terms and purpose of the two acts of 1868. The proper head of a department, at any time before a requisition issues, may transmit it to the Court of Claims, or he may refuse to issue his requisition, and report the case to Congress if it be a matter of which the Court of Claims has not jurisdiction.

V. This position is clearly and manifestly wrong. It is settled perfectly well the other way. In order to refuse a *mandamus* on this ground, there must be another specific

and effectual remedy. *Rex* vs. *Wyndham* Cowp., 378; *Rex* vs. *Chester*, (Bishop,) 1 F. R., 396; *Rex* vs. *Bristol Dock Co.*, 12 East., 429. Two circumstances must concur—a specific legal right—the absence of a specific legal remedy. 1 N. P., 480; 6 A. E., 355; W. W. D., 166.

This question is disposed of by the Supreme Court in the Wheeling Bridge case. 13 How., 563–4; *Marbury* vs. *Madison*, 1 Cranch, 137.

The same matters, in all their bearing, were alleged in case of *United States* vs. *Kendall*, 12 Peters, 614–15, and overruled by the court.

The two acts of Congress relied on by Secretary Boutwell, in his opinion attached to the brief of his counsel, as a legislative recognition of his construction of the act of July 27, 1861, would seem rather to have been designed to take the Missouri claims out of the power of the Treasury Department, and to establish independent tribunals for their settlement. If these acts prove anything pertinent in the present controversy, they prove rather the dissent than concurrence of Congress in regard to the construction contended for.

GEORGE McKEE,
ALLAN A. BURTON,
BARTLEY & CASEY,
Of Counsel for Relator.

APPENDIX.

40TH CONGRESS, 3d Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 26

ADJUSTMENT AND SETTLEMENT OF ACCOUNTS AGAINST THE GOVERNMERT.

FEBRUARY 16, 1869.—Ordered to be printed and recommitted to the Committee on the Revision of the Laws.

Mr. POLAND, from the Committee on the Revision of the Laws, made the following report:

The Committee on the Revision of the Laws, to whom was referred a communication from the Secretary of War in relation to payments made by that department under the provisions of an act passed March 30, 1868, and suggesting that said act be repealed or modified, have had the same under consideration, and report thereon as follows:

By the act of March 3, 1817, the offices of accountants in the War and Navy Departments were abolished, and it was provided that thereafter "all claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the Treasury Department."

This act provided for the appointment of an additional comptroller and four auditors, making, in all, two comptrollers and five auditors, and entire and complete jurisdiction over the settlement and adjustment of all the claims and demands above-mentioned was vested in these officers.

This system of settling public accounts has been in operation from 1817 to the present time.

The act provided for no appeal to, or revision by, the Secretary of the Treasury, or the head of any department in which the claim originated, and it is evident, from the

language used, that the final decision by these officers was to be conclusive, except by a resort to Congress or the courts.

The committee are satisfied that it was the intent of the framers of the act of 1817 to establish a tribunal for the settlement and adjustment of accounts against the Government that should be wholly independent of, and in no way subject to, control or revision by those departments or officers by whom the public expenditures and liabilities are incurred.

The special provisions of many subsequent acts show that such was the understanding of Congress. The leading principle upon which this system of accounting and adjustment was established appears to have been that all accounts, involving the expenditure and disbursement of public monies, should be settled and adjusted by officers holding under appointments independent of the heads of departments, and who, themselves, had nothing to do with the disbursements. In short, they designed to prevent officers who made or directed the expenditure from having any voice or influence in judging of the legality or rightfulness of it, and such check was necessary to insure a judicious and honest expenditure of the public funds.

As a general rule, this interpretation of the act of 1817 has prevailed ever since its passage. We do not find that it has ever been questioned by anybody except the War Department. There has been an occasional restiveness in that department at being subjected to the decision of these accounting officers upon accounts arising in the Quartermaster General's office.

As early as 1823 the question was raised as to the conclusiveness of an adjudication by the accounting officers of the Treasury Department upon an account arising in the quartermasters' department, and the question was referred to Mr. Wirt, then Attorney General. The whole subject was fully and exhaustively considered by him in an elaborate opinion, and the conclusion reached that the adjudication of claims by the accounting officers of the treasury was final and conclusive, and binding upon all the executive departments of the Government.

In several subsequent opinions of Mr. Wirt the same views were reiterated.

During the attorney-generalship of Mr. Berrien the same question was again started, whether the decision of

the accounting officers was binding upon claims originating in the quartermasters' department.

Mr. Berrien took a different view of the subject from Mr. Wirt, aud held that such adjudications were not conclusive, but that they might be reopened and revised by the Secretary of War. Subsequent Attorneys General have had occasion to give opinions on the same subject.

The late Chief Justice Taney and Mr. Crittenden concurred in the views expressed by Mr. Wirt, while others took the same ground with Mr. Berrien.

The views of Mr. Berrien and those who have agreed with him were based mainly upon the relative rank and position of those accounting officers with the head of a department, and the seeming incongruity that the head of a department should be bound by the decision of a subordinate, and especially a subordinate in another department. It was also urged that, as it was the duty of the head of the department to issue his warrant or requisition for the money found due, he must, therefore, have the power to examine and satisfy himself that the money is justly due, otherwise he is reduced to a mere machine. This line of argument seems to the committee wholly inconclusive and unsound. Congress may, by law, devolve such powers and duties as they choose upon public officers of any rank, and when they have done so, without giving either expressly or by implications a power of revision or control to another, their action is as conclusive upon those above as those below them in dignity of position. It is the command of the law, not the command of an inferior officer, which the superior is bound to obey. The decision of the most inferior magistrate, within his jurisdiction, is binding upon the highest officers and tribunals in the land, unless the law gives them power to revise and control his decision.

It appears to the committee that this assumption of power in the head of the war or any other department to set aside and change the findings of the accounting offcers of the Government, is at war with the whole principle upon which the system is based; that the allowance and settlement of the disbursement of all public funds should be vested wholly in a set of officers other and different from those who made the expenditure. If their allowances and settlements can be set aside and changed by the head of the department under whose direction the money was paid, or the claim accrued, then the whole system of

checks to improper expenditure, which it was supposed had been establised, falls to the ground.

Aside from this consideration, the committee believe that the just rights of the Government itself, as well as the rights of claimants against the Government, are much more likely to be preserved, by being subject to the examination and adjudication of experienced men, accustomed to examining accounts and weighing evidence, than they would be if subject to revisal and reversal by the action of subordinates in another department, selected with no view to qualifications of this character.

Notwithstanding the diversity of opinion above alluded to, as to the conclusive quality of the adjustments made by the Auditors and Comptrollers in the Treasury, they were generally acquiesced in, and no very serious question of jurisdiction arose until within the last two or three years. The late war made the expenditures in the quartermasters' department many times greater than ever before, and of course as variable in circumstances as they were large in amount. It then began to be stoutly insisted in that department that claims arising thereunder should be settled in that department, and that they were not bound by decisions of the accounting officers of the government. The number of cases involved in this controversy was so great that the matter was brought to the attention of Congress, and after a very full and careful consideration of the subject, it resulted in the passage of the act of March 30, 1868.

The committee do not regard that act as having added at all to the conclusiveness of the decisions made by the accounting officers of the Treasury, beyond what it was under the act of 1817. The only substantial change made by that act was the power given to the head of a department, doubting the correctness of any balance certified to him by such officers, to return it for re-examination, with any evidence in his possession bearing upon the subject.

It is suggested in the letter of the Secretary that his department is embarrassed in asking for appropriations, by reason of their want of knowledge of the amounts needed for the payment of claims upon it, if the amount is to be fixed by officers of another department. It is impossible for the committee to see much force in the suggestion. If the estimates are made in advance of the settlement of the claims to this extent, they must be wholly uncertain, by

whomsoever they are to be settled, unless the estimate is to furnish an arbitrary rule for settlement, which would be unjust. If the estimates are made after settlement, there is no uncertainty in either mode of settlement. But if it be true that under this mode of settlement the department has made underestimates, so that they are not in possession of funds for the payment of claims allowed, the hardship would seem to be upon the claimants, whose payments must be delayed until the department is in funds.

It is suggested by the Secretary in his letter, that in case of disagreement between the accounting officers in the Treasury and the War Department as to the allowance of a claim, the claimant might be sent to the Court of Claims for the balance, or the whole of his claim, as the case might be.

Section 7 of an act passed June 25, 1868, seems to provide all that the Secretary desires in this behalf, by authorizing the head of any executive department, when any claim is made upon his department, and the amount in controversy exceeds $3,000, and in other cases where the questions involved are important, to send such claimant to the Court of Claims.

In the judgment of the committee, the present system of public accounting, (which has worked so satisfactorily, with few interruptions, for more than half a century,) ought not to be disturbed, and that the act of March 30, 1868, which was designed to prevent such interruptions in the future, was just and wise, and that no necessity exists for its repeal or modification.